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No. 606

In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the circuit court of appeals (R. 1467–1476) is reported at 156 F. 2d 964.

JURISDICTION

The judgment of the circuit court of appeals was entered August 14, 1946 (R. 1476). On September 13, by order of the Chief Justice, the Government's time to file a petition for a writ of certiorari was extended to October 12, 1946 (R. 1478). The petition for a writ of certiorari was filed October 11, 1946, and was granted December 9, 1946 (R. 1479). The jurisdiction of this Court

rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

1. Whether a voluntary confession by an officer of the Army held in military custody was rendered inadmissible under the rule of *McNabb* v. *United States,* 318 U. S. 332, where such officer, though duly informed of the charges against him in the course of the investigation prescribed by the 70th Article of War, was not served, within eight days after his arrest, with the charges that were referred for trial after that period; and if so, whether a second confession, voluntarily made when the accused was free from restraint, was rendered inadmissible through the circumstance that the accused, at his own request, reread his earlier confession at the time he made his second statement.

2. Whether a claim of double jeopardy may properly be based on a conviction by court-martial which was disapproved because of failure of the tribunal to afford accused an opportunity to present evidence in support of his plea to the jurisdiction; and if so, whether a trial by court-martial for conduct unbecoming an officer and a gentleman and for conduct to the prejudice of good order and military discipline and of a nature tending to bring discredit upon the military service, by accepting money for arranging the transfers of

certain enlisted men to prevent their going overseas, bars a trial in a federal district court for conspiracy to defraud the United States of its right to the honest performance of the officer's duty.

3. Whether the district court committed an abuse of discretion in refusing to reopen the case, four hours after the jury had retired, to allow the defense to introduce additional evidence.

4. Whether the court below correctly held that the trial judge's concededly proper statement of the law in his instructions concerning the defense of extortion constituted reversible error because the statement was too cryptic.

STATUTES INVOLVED

The pertinent statutes involved are set out in Appendix A, *infra*, pp. 96–104.

STATEMENT

Respondents were convicted in the United States District Court for the Southern District of New York on a one count indictment charging conspiracy to defraud the United States of its right to the faithful and disinterested services and judgment of officers of the United States Army (R. 8–11, 1176). The indictment specified that it was part of the conspiracy that respondent Samuel Bayer, father of Martin Bayer and uncle of Melvin Usdan, both of them soldiers in the United States Army, and respondent Elias Bayer,

uncle of the two boys, would give respondent Radovich, an officer of the United States Army, $7,000 in order to induce Radovich to transfer the boys to various units for the purpose of keeping them from being sent out of the United States for duty overseas. Samuel Bayer was sentenced to imprisonment for two years and to pay a fine of $10,000; Elias Bayer to imprisonment for eighteen months and to pay a fine of $5,000; and Radovich to imprisonment for a year and a day (R. 1211–1212). On appeal, the judgments of conviction were reversed (R. 1476).

A. THE EVIDENCE FOR THE GOVERNMENT

A short time before December 15, 1942, Samuel Bayer learned that men enlisting in the Army before December 15 would be allowed to select the branch of service in which they wished to serve and that men subsequently drafted would in all likelihood be assigned to the infantry (R. 184, 276–277). Martin Bayer, Samuel's son, and Melvin Usdan, his nephew, both enlisted in the Air Corps on December 15 and were assigned as clerks to base headquarters at Mitchel Field, Long Island (Govt. Ex. 27, R. 907, 1312; Govt. Ex. 11, R. 496, 1233; Govt. Exs. 28, 29, R. 908, 909, 1313, 1319). In the period following this assignment, Elias Bayer met and introduced to Samuel various officers attached to the First Fighter Command at Mitchel Field (R. 133, 187, 363, 395; Ex. 8, R. 491, 1225). Samuel and Elias Bayer enter-

tained these officers extensively (R. 149, 395; Govt. Ex. 11, R. 496, 1241–1242; Govt. Ex. 19, R. 505, 1274; Govt. Ex. 20, R. 505, 1285–1287), and Samuel Bayer, through his company, the Plymouth Thread Company, paid for uniforms made for the officers by a firm owned by Samuel's brothers-in-law (R. 134–135, 152, 166–167, 186–188, 201, 366–367; Govt. Ex. 13, R. 498, 1246).[1]

In April 1943, members of the Women's Army Corps began to replace male clerical personnel at Mitchel Field with the result that male personnel were pooled for transfer to other fields (R. 369, 397). One Colonel Jacobson requested the transfer of Martin and Melvin from base headquarters to the First Fighter Command (R. 397–398). Samuel Bayer told another officer that he understood that the effect of this transfer was to assure the assignment of the boys to Mitchel Field for approximately one year (R. 278). A few days after the transfers were effected, Samuel Bayer tendered a dinner to Colonel Jacobson at the Waldorf-Astoria Hotel and presented him with four new automobile tires (R. 370–372).

The April transfer placed Melvin and Martin under the command of Radovich (R. 141, 835).

[1] In the summer of 1944, at Samuel Bayer's request, the books of the uniform company were altered to indicate that payment had been made by the officers themselves rather than the Plymouth Thread Company (R. 190–195). Prior to this, both of the Bayers, when interviewed by an Army investigating officer, had denied paying for the uniforms and had denied making payments to Radovich (R. 507–513).

In July 1943, there were rumors current at Mitchel Field that the Bayers were making gifts to officers of the First Fighter Command (R. 207–208, 280–281). Radovich informed Samuel Bayer that the boys would have to be transferred (R. 924; Govt. Ex. 25, R. 661, 1309). At Samuel's request to have the boys kept at Mitchel Field, Radovich approved a transfer of the boys from his own unit to the medical detachment at the field (R. 115–118; Govt. Ex. 25, R. 661, 1309–1310). The transfer was originally disapproved because of the shortage of clerks, but was effected by an exchange of personnel between the two units. (Bayer's Ex. D., R. 889, 1334, 1337–1338). While this transfer was pending, Samuel and Elias went to Mitchel Field and asked Colonel Vidal to facilitate the transfer (R. 137–139). After the transfer was effected, Samuel paid Radovich approximately $2,000 (Govt. Ex. 25, R. 661, 1310).

A short time later, in August 1943, the boys were transferred to an airborne engineer unit scheduled for duty overseas (R. 140, Govt. Ex. 27, R. 907, 1312). Samuel and Elias called Colonel Vidal several times and requested him to prevent the transfer, but were informed that nothing could be done (R. 140–141). Samuel also communicated with various Army officers whom he had previously met and attempted to induce them to arrange to have the boys transferred out of the engineer unit, but these officers declined

to intercede (R. 160, 176–177, 374). Samuel said to one officer, "I would do anything in my power to keep my boy from going overseas" (R. 176).

In the meantime, Radovich had left Mitchel Field and joined the First Air Commando Group (R. 253). This organization was given highest priority on personnel, and its officers' requests for transfer of personnel were regularly and quickly honored (R. 231–232, 254). In August and September 1943, Radovich, on three occasions, discussed with Captain Pepper, a personnel officer at Mitchel Field, the possibility of arranging a transfer of Martin and Melvin out of the airborne engineers to the Air Transport Command, a unit set up for service in the continental United States (R. 208–211). Pepper told Radovich that the boys could be transferred only at the request of an organization having a higher priority than the airborne engineers (R. 209). Radovich suggested to Pepper that it might be possible to have the boys transferred to the First Air Commando Group and subsequently have them dropped as surplus and transferred to the Air Transport Command (R. 211). Pepper agreed that in this way a transfer might be arranged (R. 211). Radovich told Pepper that if he could effect such a transfer, it would be "worth his while," and he would see that it would be worth Pepper's while (R. 211–212).

In September 1943, Samuel Bayer asked an Army officer whether he thought there would be

any trouble if his boys were transferred out of the alerted unit. When the officer said that he thought the consequences would be serious, Bayer cried and said that he wanted his son out of the unit. (R. 283–284.)

On November 22, 1943, at the request of Radovich, a teletype message was sent from Headquarters Army Air Forces in Washington directing the transfer of Melvin and Martin from the Airborne Engineers to the First Air Commando Group at Goldsboro, North Carolina, and ordering them to report not later than November 25 (Govt. Ex. 3, R. 118–121, 1217–1218; R. 256). On November 24, Radovich called a clerk in the office of the Army Air Forces in Washington and requested that the boys be transferred from the Air Commando Group to the Air Transport Command (R. 256–257). This request was honored by a letter dated November 25, 1943, from Headquarters Army Air Forces in Washington (R. 123; see Govt. Ex. 4, R. 121, 1218). Meanwhile, when Melvin and Martin arrived at Goldsboro on November 25, they were seen by Lieutenant Colonel Boebel who had previously been at Mitchel Field (R. 262–263). He asked the boys whether they knew that the new organization was made up of volunteers and they replied that they did (R. 265). Subsequently, Colonel Boebel told Radovich that he did not think the boys were the type of men desired in the organization and Radovich said they

would be transferred out (R. 264). The transfer from the Air Commando Group to the Air Transport Command was effected on November 29, 1943, pursuant to authority contained in the letter from Headquarters Army Air Forces dated November 25 (Govt. Ex. 4, R. 121–123, 1218). Shortly thereafter, Elias Bayer and an unidentified man met Radovich outside the railroad station at Goldsboro and gave him an envelope containing $5,000 (Govt. Ex. 15, R. 500, 1254–1256; Govt. Ex. 20, R. 505, 1279, 1281; Govt. Ex. 25, R. 661, 1311). Some time thereafter, Radovich sent Captain Pepper a bank draft in the sum of $500 (R. 212; Govt. Ex. 25, R. 661, 1311).

In September 1944, while Radovich was in military custody at the hospital at Mitchel Field, he called upon Colonel Jacobson who was then in the hospital. When asked how he came to be involved Radovich said: "I was going overseas on a very hot job and didn't expect to come back, had the wife and the baby, figured I might just as well take care of them" (R. 376).

B. RADOVICH'S CONFESSION

In the course of the trial, the Government offered in evidence a statement by Radovich given to an agent of the F. B. I. on March 15 and 17, 1945, in which Radovich admitted accepting $7,000 from the Bayers for arranging the transfers of Martin and Melvin (R. 531–533; Govt. Ex. 25, R. 661, 1306–1312). When counsel for Radovich

objected to the admission of this statement, a hearing was had outside the presence of the jury on the question of its admissibility (R. 533–536). The facts adduced at the hearing are as follows:

On August 9, 1944, Radovich was placed in confinement at Mitchel Field pending a trial by general court-martial for violation of the 95th and 96th Articles of War (R. 591). He was confined in a separate room in the psychopathic ward of the hospital at the field (R. 561–563). On August 10, 1944, charges were preferred against him (R. 584–585), and on August 25 the report of the investigation of those charges was sent to headquarters (R. 606). In the meantime, on August 21, 1944, Radovich had submitted his resignation for the good of the service, stating therein that he had been informed that charges were pending against him for violation of the 95th and 96th Articles of War (R. 596–597).[2]

[2] The resignation was forwarded to Headquarters Army Air Forces, with a favorable recommendation on January 27, 1945. The indorsement forwarding the application stated that the reason for delay was that, at the request of the United States Attorney, all action in the case had been suspended pending completion of an investigation of the civilians involved. (R. 596–598.) The resignation was "not favorably considered" by the War Department in March 1945 (R. 598–601), i. e., it was rejected. The charges were referred for trial by court-martial in May 1945, and Radovich was formally served with the charges on which he was to be tried on May 29, 1945 (R. 585–587). The reason given for the delay in the trial by court-martial was the request of the United States Attorney that no action be taken pending completion of the investigation of the civilians involved (R. 606–607).

For the first eight or ten days of his confinement in the psychopathic ward, Radovich was not allowed out of the room and was deprived of all articles which might be used to inflict injury (R. 561, 566). Thereafter, he was taken for a walk each day (R. 573). In the course of his daily exercise, Radovich mentioned to the guard who accompanied him that he would like to consult with Warrant Officer Bradspies, his counsel. The guard transmitted this request to his superior officer, and Bradspies was directed to interview Radovich. (R. 576, 578–579.) Some time thereafter (see R. 579), on September 5 or 6, 1944, a colonel introduced two F. B. I. agents to Radovich, told him that the agents wanted to talk to him about the case, and that it was up to Radovich whether he wanted to say anything to the agents (R. 541–542). During the interview with the F. B. I. agents, Radovich made or received some telephone calls, and the name of Bradspies was mentioned (R. 543, 549). Also, during the course of that interview, an officer delivered to Radovich an order instructing him not to wear his decorations, but Radovich refused to remove them (R. 553, 577–578). The F. B. I. agents told Radovich they were investigating the matter and had come to get his story (R. 548). He gave his version of the transactions without hesitation (R. 542–543). Radovich did not appear to be worried; he said he regretted the whole affair and wanted to get

it all straightened out (R. 549). Radovich signed a written statement at that time (R. 538).

On September 16, 1944, Radovich was released from confinement and subjected to administrative restriction allowing him the freedom of the base except for the officers' club, base operations, flying field and flying lines (R. 593–595). On January 2, 1945, the restrictions imposed on September 16 were removed, except as to the officers' club, and Radovich was required merely to secure permission from the base commander prior to any departure from the limits of the base (R. 595).

Between September 16, 1944, and March 15, 1945, Radovich had a number of conversations with F. B. I. agents, sometimes on his own initiative and sometimes by appointment (R. 537–538). In the course of these interviews, he recounted some facts not covered in the statement given to the F. B. I. in September 1944, and the F. B. I. arranged a meeting with Radovich to incorporate the entire story into one statement (R. 536–539). At the request of Radovich, the agent produced the original statement given in September 1944, and Radovich read over that statement before making his second statement in March (R. 539, 540, 551). Only the March statement, made in the F. B. I. office in New York (R. 531–533), was offered in evidence.

The trial judge ruled that the statement of September 5, 1944, was voluntary, that Radovich's

confinement at that time was not illegal, and that, in any event, any infirmity in the September statement did not apply to the March statement (R. 657–658). He accordingly admitted the March statement, but only as against Radovich (R. 660). On appeal, the circuit court of appeals held that this was error; it said that since Radovich had not been served with a copy of the charges within eight days after his arrest, as required by the 70th Article of War, his custody was analogous to that of a person held on a criminal charge without preliminary arraignment, and, hence, that any confession obtained during such period was inadmissible under the rule enunciated by this Court in *McNabb* v. *United States*, 318 U. S. 332; and that since the first confession was used at the time the second was given, the irregularity of the custody tainted the second as well as the first. (R. 1473–1475.)

C. RADOVICH'S PLEA OF DOUBLE JEOPARDY

On June 29, 1945, Radovich was convicted by court-martial on charges of violating the 95th and 96th Articles of War (10 U. S. C. 1567, 1568, Appendix, *infra*, p. 104), i. e., of conduct unbecoming an officer and gentleman, and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service. As to each offense, the specifications alleged that in August 1943 Radovich received from Samuel Bayer $2,000

to effect the transfer of Martin Bayer and Melvin Usdan from the First Fighter Command to the medical detachment at Mitchel Field, and that on or about December 1, 1943, he accepted and received from Elias Bayer $5,000 for effecting the transfer of the boys from an organization alerted for duty overseas to the Air Transport Command (R. 14–17).

The indictment in the instant case was returned on July 12, 1945 (R. 3). On September 26, 1945, Radovich filed a plea in bar alleging that his conviction by court-martial precluded his trial under the present indictment (R. 4, 13–14). The Government demurred to the plea (R. 20–21).

On the argument of a motion for a continuance before argument on the plea, counsel for Radovich stated that he thought the court-martial conviction had been disapproved (R. 27), but that he had not been officially so informed (R. 30). The United States Attorney stated that he had seen the decision of the Board of Review disapproving the conviction (R. 41). In ruling on the plea and the demurrer thereto, however, the court accepted the allegation in the plea that Radovich had been convicted by court-martial (R. 55). The judge sustained the Government's demurrer on the ground that the offense charged in the indictment was not the same as the offenses for which Radovich had been tried by court-martial (R. 83–85).

On appeal, the circuit court of appeals ruled that the plea of double jeopardy should have been sustained if Radovich's conviction by court-martial was final. However, inasmuch as the record left the status of the military judgment in doubt, and a new trial was being ordered for other reasons, the circuit court of appeals left open the question of double jeopardy for determination on the new trial (R. 1475–1476).

We are advised that, pursuant to AW 50½ (10 U. S. C. 1522, *infra*, pp. 97–102), the Board of Review disapproved Radovich's conviction on the ground that the court-martial committed prejudicial error in failing to give him an opportunity to offer evidence in support of his plea to the jurisdiction, in which he had alleged that the authority convening the court-martial was in fact the real accuser. See AW 8 (10 U. S. C. 1479). The Judge Advocate General concurred in that holding; his views and those of the Board of Review are set forth in Appendix C, *infra*, pp. 110–121. Thereafter, no rehearing by court-martial under AW 50½ having been directed, the War Department published the disapproval in General Court-Martial Orders No. 240, July 26, 1946; Appendix D, *infra*, pp. 122–125.

D. THE BAYERS' DEFENSE

The Bayers sought to defend themselves against the charge of conspiracy on the ground that the payment of money to Radovich was not made

pursuant to agreement but was extorted by Radovich. In statements given to the United States Attorney before trial, which were introduced in evidence by the Government, the Bayers said that after Radovich had approved the transfer of the boys to the medical unit in August 1943 he asked for money (Govt. Ex. 8, R. 491, 1226–1228; Govt. Ex. 13, R. 498, 1249–1250; Govt. Ex. 20, R. 505, 1277, 1278), and that after the boys had been transferred to the Air Commando Group, Radovich came to New York and told Samuel Bayer that he would take the boys overseas to Burma unless he received $5,000 (R. 1229–1231, 1279). In their defense, the Bayers called as a witness Samuel Bayer's secretary, Anne Solomon (R. 915). She testified that, after the boys were transferred to the medical unit at the field, Radovich asked to speak with Samuel Bayer privately; that she listened outside the door and heard Radovich ask Bayer for $500 to send his wife to California (R. 925); that in two other conversations which she also overheard Radovich asked for additional funds (R. 926); and that subsequently, after the boys were transferred from Mitchel Field to the Airborne Engineers, she heard Radovich say that for $1,500 he could have the boys sent back (R. 927). She further testified that on the same morning that Martin Bayer telephoned his father that he was being transferred to Goldsboro, North Carolina (R. 929–930),

a date fixed by Melvin Usdan as November 24, 1943 (R. 862), Radovich called from Washington and asked Samuel Bayer to meet him for lunch that day; that at lunch Radovich in her presence said that he was taking the boys with him to Burma unless Bayer paid him $5,000 (R. 928–929); that the next day, i. e., November 25, 1943, Radovich again stated that if Bayer did not give him $5,000 he would take the boys with him to Burma (R. 930). Miss Goertz, a clerk in the office of Headquarters Army Air Forces, Washington, D. C., had previously testified for the Government that on November 24, 1943, Radovich called her from Goldsboro, North Carolina, and asked her to transfer Martin and Melvin to the Air Transport Command (R. 256–257), and it had also been shown that the transfer had been authorized by a letter from Headquarters Army Air Forces dated November 25, 1943 (R. 123; Govt. Ex. 4, R. 121, 1218). Counsel for the Bayers had taken particular note of the date of such letter (R. 123).

In discussing the Bayers' defense of extortion in his summing up, the United States Attorney pointed out to the jury that Samuel Bayer had approached other officers seeking to have his son transferred out of the airborne engineers (R. 1069) and further argued that the Bayers' denials, when they were first questioned by military authorities, that they made any gifts to Radovich, were

inconsistent with their defense that they were the victims of extortion (R. 1070). Then, after noting that the luncheon meeting to which Miss Solomon testified must have occurred on November 24th, the United States Attorney stated (R. 1072–1073):

> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command.
>
> Now we see clearly here from the undisputed evidence that this alleged extortioner is in fact bringing about the transfers of the boys out of the Transport Command [*sic*] on the very day that, according to Sam Bayer, he, Radovich, is threatening to take the boys on a dangerous mission that he arranged—he, Radovich, arranged—through Miss Goertz for the transfer of these boys out of the Air Commando unit the day before the boys even arrived

at Goldsboro. Because Melvin Usdan's testimony is that they did not get to Goldsboro until the 25th. So that by the time they arrived there Radovich, in carrying out the conspiracy, with the aid of the lady in Washington, had already arranged to get them out of the Commando. So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944, when Colonel Snyder asked him to tell him what he knew about the Radovich case and he said he knew very little. Well, there is certainly no doubt that $5,000 was paid by Samuel Bayer and there is no doubt that Radovich got $5,000. Radovich says the Bayers offered him the money. The Bayers say the money was paid under threat. Well, I leave it to you ladies and gentlemen to decide on the basis of the undisputed testimony in this case and the records in this case where the truth lies.

The next day, before the judge charged the jury, counsel for the Bayers stated that they had been surprised by the Government's questioning of the meeting on November 24 and that a check of the records had shown a collect call from Washington to the Bayers on that date (R. 1116–1117). The court stated that, if counsel so desired, he would tell the jury that the records showed such a collect call, and counsel requested

the court to tell the jury that the statement was being made at their request (R. 1125–1126). At the suggestion of counsel for Radovich, the court also stated that he would tell the jury that the records did not show who made the call (R. 1127). The judge made such a statement to the jury at the opening of his charge (R. 1129).

After the jury had been out about four hours (R. 1154), they asked for a rereading of the judge's charge on conspiracy and of the United States Attorney's summing up (R. 1155). The judge declined to read the argument of one counsel without reading the arguments of all (R. 1155). Some of the jurors stated that they were particularly interested in the United States Attorney's summary of the telephone messages and meetings from November 22 to November 25, 1943 (R. 1163, 1166–1167). Thereafter, counsel for the Bayers asked leave to put in evidence records he had obtained from the telephone company showing a collect call from Arlington, Va., by one "Ravish" on November 24, 1943 (R. 1170–1171, 1472). The United States Attorney objected, pointing out that even if Radovich had made such a telephone call from Washington, the fact would not tend to disprove that the request to transfer the boys to the Air Transport Command had been given on the same day as the alleged threat to take the boys to Burma, and would not detract from the fact that a letter directing the transfer had been sent

from Washington on the very next day, November 25 (R. 1172), a day when, according to Miss Solomon's testimony, Radovich was making threats in New York (R. 930). The judge declined to reopen the case at that point (R. 1173). On appeal, a majority of the circuit court of appeals held that, in view of the jury's question, this action by the trial judge was an abuse of discretion which constituted reversible error (R. 1470–1471).

In instructing the jury with respect to the Bayers' defense of extortion, the trial judge charged as follows (R. 1157–1158):

> Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for [an] immediate dangerous overseas mission, which would be a violation of his duty as an officer.
>
> The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.
>
> If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did

some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

The opinion of the circuit court of appeals indicates that a majority of the court, while conceding the correctness of the charge, thought it too cryptic, but it does not appear from the

opinion whether reversal of the judgments would have been predicated on such ground alone (R. 1471).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In reversing the judgments of conviction.

2. In holding that the confession made by Radovich in March 1945 was inadmissible in evidence.

3. In holding that a confession, made by Radovich in September 1944, while he was in military custody, after investigation of charges against him but before the charges were referred to a court-martial for trial, was illegally obtained.

4. In holding that the confession made by Radovich in March 1945, when he was free of restraint, was inadmissible because at the time he made that statement he reread his earlier confession at his own request.

5. In holding that Radovich's conviction by court-martial on charges of conduct unbecoming an officer and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service would sustain a plea of double jeopardy to an indictment charging conspiracy to defraud the United States.

6. In holding that the district judge abused his discretion in refusing to reopen the case after the jury had retired in order to permit the Bayers to introduce evidence.

7. In holding that the charge to the jury explaining the law relative to the Bayers' defense of extortion was too cryptic.

SUMMARY OF ARGUMENT

I

The circuit court of appeals held that the September statement would have been inadmissible in evidence under *McNabb* v. *United States,* 318 U. S. 332, on the ground that Radovich was in illegal custody when such statement was made because he was not served with charges within eight days after his arrest as required by AW 70. It further held that, since Radovich reread his September statement when he made his second statement, the March statement was also inadmissible under *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. We submit that the decision below is erroneous both in its premise and in its conclusion.

A. The court below failed to realize that at military law under the 70th Article of War notice of the charges is given on two separate occasions, once when they are being investigated, and later when they are referred for trial. On the first occasion there is normally no physical service of the charges in the sense that the accused retains a copy of them. It is only when trial is directed—and such trial may involve fewer or lesser charges than those which were investigated—that there is a physical delivery

of the charges actually referred for trial. This is the formal service of charges prescribed by AW 70.

Here there is no evidence that the investigatory procedure directed by AW 70 and the Manual for Courts-Martial was not followed; to the contrary, Radovich's proffered resignation shows that within at least eleven days he knew the nature of the charges against him which were then being investigated. The provision in AW 70 for the investigation and forwarding of charges within eight days, if practicable, is designed principally to insure prompt disposition of the charges. The AW 70 investigation is the only procedural step which is analogous to arraignment in a civil court; there is no such thing as bail at military law. Consequently, the situation of Radovich on September 5 was not analogous to that of a person held without arraignment, but was similar to that of a person who has been properly arraigned and held for the district court. Nothing in the *McNabb* decision requires the exclusion of a voluntary confession made by a person so held.

The successive legislative modifications of the 70th Article of War show that, in its present form, it was designed to allow a reasonable time, not measured by arbitrary time limits, for holding an accused in custody pending investigation and trial. Considering the nature of the offense here under consideration, which involved civilians and appeared to involve other officers as well, a period of a little more than two weeks from August 9 to

August 25 was obviously a reasonable time for investigation. And the period from August 25 to September 5 was a reasonable time to hold Radovich in custody pending a decision on whether to try him by court-martial, particularly since Radovich had theretofore submitted his resignation for the good of the service. It is unnecessary to consider whether or not his subsequent confinement and the subsequent delay of his trial by court-martial were illegal; the only significant point here, see *United States* v. *Mitchell*, 322 U. S. 65, is that he was legally in custody on September 5 when he made his first confession. Since, therefore, Radovich was legally in custody, since he had been properly informed of the charges, and since he had had an opportunity to consult with counsel, his voluntary confession on September 5 would have been admissible in evidence, if offered.

B. Even if the September 5 confession were, for any reason not now apparent, inadmissible, that circumstance would not taint the confession made six months later when Radovich was free from all substantial restraint. Had Radovich decided to limit or repudiate his earlier confession in any respect, he had ample opportunity to do so. Instead he freely and voluntarily reaffirmed and amplified his earlier statement.

In holding that the assumed illegality of the first confession tainted the second because Radovich at

his own request reread the first confession when he made the second, the court below misapplied the rule of *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, that fruits of evidence illegally obtained are themselves inadmissible. In that case, the defendants never consented either to the original search or to the subsequent use of the information obtained from that search; the secondary evidence, the fruits of the illegal search, were the direct results of the Government's own illegal action.

Here the second confession did not come into existence by virtue of action by the Government alone; there had to be an affirmative, independent, exercise of free will by Radovich. Hence, it is immaterial whether he did or did not reread his former statement. The second statement was not the direct result of the first; Radovich's decision to reaffirm his previous statement, which he himself asked to see, was the operational fact which brought the second confession into existence. The second statement was, therefore, properly admitted in evidence against him. See *Lyons* v. *Oklahoma,* 322 U. S. 596.

II

A. The disapproval of the court-martial conviction for reasons not going to the merits eliminates the question of double jeopardy from the case. Since no rehearing by court-martial was

ordered, the case is in the posture of a civil conviction, reversed on appeal, where a new indictment is returned against the defendant. In those circumstances a plea of double jeopardy is not available. See *Burton* v. *United States*, 202 U. S. 344, 380. Since Radovich could be retried for the offense for which he was originally convicted by court-martial after such conviction was disapproved, it does not matter for constitutional purposes whether that trial is by a civil or a military court. In the end he will have had only one real trial for the offense.

It is clear that, where a verdict is reversed on appeal, the judgment will not support a plea of double jeopardy. E. g., *Murphy* v. *Massachusetts*, 177 U. S. 155, 159. On this analysis it is immaterial that review under AW 50½ is automatic; the grounds for disapproval by the Board of Review and The Judge Advocate General were the grounds urged by the accused, and the result achieved was the result which he sought to attain at the trial. Moreover, the Board of Review in effect held that the trial by court-martial was illegal. To support a plea of double jeopardy, the trial on which the plea is based must have been a valid one. *United States* v. *Ball*, 163 U. S. 662, 669.

B. Even if the question of double jeopardy remains in the case, the plea is not available to Radovich for the reason that the court-martial speci-

fications and the present indictment charged different offenses. The indictment alleged conspiracy to defraud the United States by the giving and receiving of money to influence official action. The military specifications charged the completed act of receiving money by Radovich alone. The question here is controlled by *Burton* v. *United States*, 202 U. S. 344, 377, holding that the same individual could properly be punished for the separate acts of agreeing to receive and receiving a bribe, and by *Pinkerton* v. *United States*, No. 719, Oct. T. 1945, decided June 10, 1946, holding that conspiracy to commit a crime and the substantive crime are separate and distinct offenses.

This case does not fall within the rule that a conviction for both conspiracy and the substantive offense cannot be sustained where the agreement of two persons is necessary for the completion of the substantive crime. Agreement among Radovich and the Bayers did not necessarily have to be proved to sustain the court-martial charges. The sole question there was whether Radovich had received money from the Bayers to bring about the transfers. Whether he did so pursuant to agreement with the Bayers or had extorted money from the Bayers without their consent, he could nevertheless have properly been found guilty by the court-martial. Under the indictment, however, agreement was the essence of the offense and the jury was specifically instructed that the offense

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was not established if Radovich had obtained the money from the Bayers by extortion. Hence, the offenses before the court-martial were, both in fact and in law, different from the conspiracy charged in the indictment. *Fall* v. *United States*, 49 F. 2d 506, 511 (App. D. C.), certiorari denied, 283 U. S. 867.

III

The ruling of the court below that the trial judge was guilty of an abuse of discretion in refusing to reopen the case for the further introduction of evidence four hours after the jury had retired is based on a misconstruction of the United States Attorney's argument and of the significance of the excluded evidence in relation thereto.

The gist of the prosecution's argument was that the defense of extortion was untenable for the reason that at the very time when, according to the Bayers, Radovich was making threats to take the boys with him to Burma, he had already arranged matters so that it was beyond his power to carry his threats into effect. The argument would have lost none of its force whether Radovich did or did not call Bayer from Washington, or whether he did or did not see him in New York. It would still be true, as the United States Attorney argued, that the transfer had been arranged and authorized before the alleged threats were made. Hence the fact that the jury was interested in this part of the United States Attorney's sum-

ming up did not, as the court below thought, make the question of the telephone call a matter of importance. Quite to the contrary, reopening of the case to have introduced evidence of the call would have attached to an inconclusive fact wholly unwarranted significance.

The evidence as to the dates on which the transfers were requested and authorized had been introduced as part of the Government's case long before Miss Solomon testified to threats by Radovich on November 24 and 25, and counsel for the Bayers had then taken particular note of the fact that the transfer had been authorized from Headquarters in Washington on November 25. The fact that the defense failed to appreciate the effect of the Government's evidence in undermining their defense of extortion certainly does not constitute such surprise as would justify the reopening of the trial. On this point, the decision below goes far towards putting a premium on lawyers' afterthoughts, to the prejudice of orderly judicial administration.

IV

The trial judge's charge on the Bayers' defense of extortion was held by the court below to be an accurate statement of the law, though a majority of the court thought that it was too cryptic. There is no suggestion in the record that the jury failed to understand the charge; indeed, after they had requested a rereading of the charge on

conspiracy, the judge asked whether there was any point that was not clear or that the jury would like to have amplified, and no such request was made.

In those circumstances, reversal of the conviction on the basis of the judge's charge is wholly unwarranted. Even when error is shown at a trial, such error is not in itself grounds for reversal and its significance must be judged in the light of the whole case. *Kotteakos* v. *United States,* Nos. 457–458, Oct. T. 1945, decided June 10, 1946. Here there is no finding of error and no suggestion of prejudice. The mere circumstance that some other judge might have worded the charge in somewhat more elaborate phraseology is not ground for reversal of a conviction which, as in this case, rests on strong, clear, and convincing evidence of guilt.

V

There is no merit in the other contentions urged as independent grounds for affirmance of the judgment below. Evidence of gifts by the Bayers to Army officers other than Radovich was clearly relevant on the question of the Bayers' intent to defraud, and became particularly significant in view of their contention that they were innocent victims of extortion. The contention of reversible error in connection with the charge as to aliases falls since that issue was raised by the Bayers; the jury would not otherwise have learned

of the use of the alias designation; and the charge on this point was perfectly proper. The other alleged errors are quite without substance and do not call for extended discussion.

ARGUMENT

I

RADOVICH'S CONFESSION WAS PROPERLY RECEIVED IN EVIDENCE

As we have already pointed out in the Statement, *supra*, pp. 9–13, the Government offered in evidence a confession made by Radovich in March 1945, the admissibility of which depends on the following facts, here briefly repeated in summary:

On August 9, 1944, Radovich was placed in confinement by the military authorities. Charges were preferred against him the next day, and a report of the investigation of such charges was forwarded to headquarters on August 25. In the meantime, on August 21, Radovich had submitted his resignation for the good of the service. He was kept in confinement until September 16, but he had talked with counsel some time before September 5. On September 5, he gave a signed statement to agents of the F. B. I., telling them his version of his transactions with the Bayers without hesitation. He was released from substantial restraint on September 16, but was not tried by court-martial until May 1945. Between September 1944 and March 1945, he talked with agents

of the F. B. I. on a number of occasions, and on March 15 and 17 gave them another signed statement incorporating the facts set forth in his statement of September 1944. At his own request, he reread the September statement when making the March statement.

A. *The Statement of September 1944 was legally obtained.*—Judging the September statement without reference to the rule laid down by this Court in *McNabb* v. *United States,* 318 U. S. 332, there can be no doubt that such confession was a voluntary one. It is evident that Radovich had decided that his best course was to make a clean breast of his activities, and that he was willing to cooperate with the authorities. He was asked for his version of the matter and he gave it without hesitation. He had previously consulted with counsel and he may have talked with counsel while the agents were interviewing him (*supra,* p. 11). He was so far from being intimidated that he refused to obey an order directing him to remove his military decorations (*supra,* p. 11). By any standard of voluntariness, the September 5th confession was a voluntary one.

(i) *Military practice under the 70th Article of War provides for the service of charges on two occasions, (1) in connection with the investigation and (2) after reference for trial.*

The court below thought, however, that the September confession, if offered in evidence, would

have been inadmissible under the *McNabb* rule because Radovich was not served with the charges on which he was to be tried within eight days of his arrest, a requirement which it deemed mandatory under AW 70. The opinion below is, however, predicated on a complete misconception of military procedure. The court failed to realize that at military law under AW 70 notice of charges is given on two different occasions, once when they are being investigated, and then later when they have actually been referred for trial.

The 70th Article of War, so far as here pertinent, provides that—

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the

substance of the testimony taken on both sides.

* * * * *

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him.

Normally, there is at the start of the investigation no physical service of the charges on the accused in the sense that he retains a copy of them.

He is given the charge sheet to read and examine, but in practice it accompanies the other papers which go forward to the staff judge advocate and the appointing authority pursuant to par. 35b, *Manual for Courts-Martial* (1928 ed., corrected to 1943).[3]

Successive editions of the *Manual for Courts-Martial* show clearly that the charge sheet is not required to be physically deposited with the accused in connection with the preliminary investigation prescribed by AW 70. The 1921 Manual, which represents the contemporaneous interpretation of the 1920 amendments of the Articles of War[4]—and the preliminary investigation was first included in the Articles at that time—does not require that, in connection with the investigation, a copy of the charges must be left with the accused. Par. 76b; *infra*, pp. 105–109. The 1928 edition, though it provided in more succinct language for a procedurally less cumbersome investigation,

[3] The 1928 edition of the Manual for Courts-Martial, corrected to 1943, will be referred to throughout this brief simply as MCM.

[4] "The present revision of the Manual for Courts-Martial has been prepared primarily to conform the manual to the changes in the Articles of War accomplished by the act of June 4, 1920, and to embody the results of decisions made by the Office of the Judge Advocate General and the War Department, and such other changes in the regulations for the government of courts-martial and courts of inquiry as have been approved by experience. * * * This Manual takes effect February 4, 1921, at the same time as the new Articles of War." *Manual for Courts-Martial* (1921), pp. x–xi.

did not change those substantive requirements. That edition of the Manual (as corrected to 1943) specifically provides (par. 35a, p. 24):

> At the outset of the investigation the accused will be informed of the following: The offenses charged against him; the names of the accuser and of the witnesses, as far as then known to the investigating officer; the fact that the charges are about to be investigated; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation; his right to have the investigating officer examine available witnesses requested by him; and his right to make or submit a statement in any form subject to the risk of having such statement used against him.

And TM 27-255, *Military Justice Procedure* (1945), states, in somewhat less technical language (p. 38):

> At the outset, the accused should be advised that an impartial investigation of the charges is to be conducted. The nature of the charges, the name of the accuser, and the names and substance of the testimony of all witnesses should be made known to him. He should be shown the charge sheet and accompanying papers. He should then be advised that he has the right to cross-examine all witnesses against him if available, to call any available additional

witnesses in his own behalf, to introduce any other evidence, and to make any statement bearing on the case subject to the risk of having it used against him. He must be specifically warned that it is not necessary for him to make any statement. He should be made to understand that the investigating officer is seeking the truth, not playing the role of prosecutor.

Thus, at the moment when the investigation required by AW 70 commences, a person subject to military law who is charged with an offense under the Articles of War is informed, customarily by letting him read and examine the charge sheet, of the nature of the complaint against him. The investigation thus commenced must if practicable be completed within eight days, AW 70, and after completion of the investigation, the charges and the summaries of evidence are forwarded to the officer exercising appropriate court-martial jurisdiction. Par. 35a, MCM. Where, as here, the accused is an officer, so that only a general court-martial has jurisdiction (AW 12; MCM, par. 14), the papers must be submitted to the staff judge advocate of the appointing authority for a written recommendation as to whether trial shall be had. MCM, par. 35b. The officer exercising general court-martial jurisdiction decides whether trial shall be had, and upon which specifications. He has the power to direct that certain of the offenses charged shall not be re-

ferred for trial, or that the accused be tried only on a lesser charge. See MCM, par. 34. It is only then, when a trial is ordered, that the accused is served with a copy of the charges actually referred for trial. This time a copy is physically delivered. MCM, par. 41e.

There is no showing in this case that the investigatory procedure prescribed by AW 70 and the Manual for Courts-Martial was not followed. The charges were forwarded on August 24, 1944, after completion of the investigation, 15 days after Radovich's arrest, but the record is silent as to when the investigation was commenced, at which time the accused is normally shown (i. e., served with) the charges. There is, of course, a presumption that the investigating officer acted in compliance with his plainly prescribed official duty. See *Stearns Co.* v. *United States*, 291 U. S. 54, 63; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14–15; *Town of Weyauwega* v. *Ayling*, 99 U. S. 112, 119. And this compliance does not rest merely in presumption. Radovich's resignation, dated August 21, 1944, shows that within at least eleven days he knew the nature of the charges against him which were then under investigation, and that they were laid under the 95th and 96th Articles of War (*supra*, p. 10). At this time, the Bayers were still denying having paid him any money (R. 506–518). The evidence in this case that Radovich was served with charges on May 29, 1945, relates to the formal service of the

charges which had been referred for trial, and not to service of charges during the course of the investigation preliminary to trial.

The basic assumption of the decision below, that Radovich was not informed of the charges under investigation within eight days after his arrest, is thus not supported by the record, and the reasoning of the opinion below falls with that assumption. For it is clear that it is only the investigatory procedure, not the formal service of charges on which the trial is to be had, which can be considered as analogous to the civil arraignment statute on which the *McNabb* decision was based. Arraignment before a committing magistrate in criminal cases is designed to require the Government to show probable cause for holding the accused, and it enables the accused to learn the charges against him (see *McNabb* v. *United States*, 318 U. S. 332, 343–344). These functions are served by the investigatory procedure prescribed by the AW 70 and by par. 35 of the Manual. Before the results of the investigation are forwarded to the officer exercising general court-martial jurisdiction, the accused has already been informed of the charges against him and has already had an opportunity to learn the nature of the Government's evidence and offer evidence on his own behalf. The provision for completion of the investigation and forwarding of charges within eight days, if prac-

ticable, is designed primarily to insure prompt disposition of the charges. In no way is it analogous to arraignment.[5]

Under these circumstances, we submit that the situation of Radovich on September 5, 1944, when he made his first statement to the F. B. I., is not analogous to that of a person held without arraignment, but is similar to that of a defendant who has been properly arraigned and held for the district court. And in such a situation, an accused soldier is not, like a civilian charged with a noncapital offense, entitled to bail; he remains in custody. There is, of course, no bail at military law. Dig. Op. JAG (1912), p. 481, par. IC. Consequently, nothing in the *McNabb* decision requires the exclusion of a voluntary confession made by a person so held.

(ii) *The 70th Article of War does not prescribe time limits beyond which the custody of an accused becomes automatically illegal.*

In opposition to the petition for certiorari, Radovich contended that, even though he was informed of the charges against him during the course of the investigation, his custody on September 5, 1944, was nevertheless illegal and

[5] At military law, arraignment does not take place until the trial on the merits, after the court is organized, when the charges and specifications are read to the accused and he is asked how he pleads. MCM, par. 62; 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *352–354; Davis, *Military Law of the United States* (3d ed. 1913) 96.

hence that the principle of the *McNabb* decision was applicable. He apparently interprets AW 70 as laying down an absolute requirement that service of charges on which trial is to be had be made within eight days after arrest, i. e., that a trial be ordered within such period; and he argues that since no trial was ordered in that time, he could not properly be held in custody. (Br. Opp. 22.)

Such a contention runs contrary both to the language and the legislative history of AW 70. That article clearly contemplates that service of charges for trial will be made some time after the investigation has closed, for it provides that—

> The trial judge advocate will cause to be served upon the accused a copy of the charges upon which the trial is to be had, and a failure so to serve such charges will be ground for a continuance *unless the trial be had on the charges furnished the accused as hereinbefore provided.* [Italics supplied.]

Obviously, therefore, formal service of charges referred for trial is a matter apart from and subsequent to the service of charges being investigated.

Moreover, the successive amendments made in what is now the 70th Article of War show conclusively that the changes were specifically designed to eliminate the absolute time limitations on the length of an accused's custody which

petitioner and the court below would now read into the statute.

From 1874 until 1916, the statutory provisions now in question were as follows (R. S. 1342):

> ART. 70.—No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.
>
> ART. 71.—When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.*
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> * * * * * *

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* For the history of this article, originally Sec. 11 of the Act of July 17, 1862, c. 200, 12 Stat. 594, 595, see 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *166; Davis, *Military Law of the United States* (3d ed. 1913), p. 488.

ART. 93.—A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often as may appear to be just: *Provided,* That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

These provisions proved unworkable after American forces were on foreign service, in the Philippines and elsewhere, and General Crowder, Judge Advocate General of the Army after 1911, pointed out their defects to Committees of Congress in hearings upon a projected revision of the Articles of War. He said in 1912 (S. Rep. No. 229, 63d Cong., 2d sess., p. 88):

> First, that they are all lacking in penal sanction; second, that the prescribed time limits are often impossible to observe, and, if observed, would in certain grave cases lead to escapes; and, third, they were enacted when foreign service was not particularly in view, and did not take into consideration delays which under present conditions are inseparable from the administration of military justice.

These views were elaborated by General Crowder in his testimony in 1916 before the Senate Committee on Military Affairs. See S. Rep. No. 130, 64th Cong., 1st sess., to accompany S. 3191. He said, commenting on old Article 93, *supra* (S. Rep. 130 at 44, 46):

> That was Civil War legislation. It is preserved in new article 20 except the proviso

which provides that in case of close confinement trial must not be delayed longer than 60 days. Trial must of necessity be delayed more than 60 days in certain cases or other distant possessions in order to secure evidence from Alaska or the Philippines for use in the United States, or the reverse. The right of the accused to a speedy trial has, however, been carefully guarded by proposed article 70, under the terms of which any officer who is responsible for unreasonable or unnecessary delay in carrying the proceedings against an accused to a final conclusion "shall be punished as a court-martial may direct."

* * * * * *

GEN. CROWDER. We found it absolutely impossible to comply with that proviso after the Philippines were acquired. We had to delay trial longer than 60 days, because we could not get mail out there and back and get depositions in his case in that time. Ordinarily, a man is not in arrest when he is before a court-martial for trial, except in the very gravest cases.

With respect to old Articles 70 and 71, General Crowder had this to say (pp. 50–51):

The existing articles (70 and 71), like the new article which replaces them (70), represent an attempt to extend by statute, to a military accused, the right to a speedy trial. The objections to the existing law (70 and 71) are: (*a*) That the articles are

lacking in penal sanctions; (*b*) that they prescribe time limits often impossible to observe and which, if observed, would in certain graver cases lead to escape; and (*c*) that they were enacted when foreign service was not in view, and, therefore, did not take into consideration evils which are now inseparable in the administration of justice. The General Staff, believing that it would be impossible to insert superior time limits which could be observed in emergent conditions of military service and at times under normal conditions, declined to insert any, and, in their article, which is the article before you, made no attempt of this character.

They limited the provision of the article to the requirement that charges should be investigated promptly and immediate steps taken to try and punish, and holding the officer responsible for unreasonable or unnecessary delay on trial by court.

The corresponding article of the bill, already twice passed by the Senate, was placed upon the existing English article, and reads as follows:

"*Investigation of and action upon charges.*—The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him

from arrest or confinement. In every case where a person remains in military custody for more than five days without being served with charges upon which he is to be tried a special report of the necessity for the delay shall be made by his commanding officer, in the manner prescribed by regulations, and a similar report shall be forwarded every five days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to take such steps or to render such report who willfully or negligently fails to do so promptly and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct: *Provided,* That in time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

The General Staff in considering this article, criticized the five-day periods established as too short, and wrote in, tentatively, a period of eight days. Further reflection convinced them that any prescribed periods

would prove embarrassing, and they therefore reported the article in the form in which it appears in the bill before you. Personally, I favor the article as already twice passed by the Senate and which, as passed, reads as follows, substituting eight-day periods for five:

"ART. 72. *Investigation of and action upon charges.*—The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest and confinement. In every case where a person remains in military custody for more than eight days without being served with charges upon which he is to be tried a special report of the necessity for the delay shall be made by his commanding officer in the manner prescribed by regulations, and a similar report shall be forwarded every eight days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial, the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to render such re-

port who willfully or negligently fails to do so promptly, and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct: *Provided,* That in time of peace no person shall against his objection be brought to trial before a general court-martial within a period of eight days subsequent to the service of charges upon him."

I see no other way to establish that rigid accountability to superior authority for expedition in trial than by incorporating time limits as they are proposed in this article, which, as I say, the Senate has already passed twice.

In a "Comparative Print showing S. 3191 * * * with the Present Articles of War" (64th Cong., 1st sess.), it was said, commenting on the old provision (pp. 41–42)—

> The fact that the officer has committed some grave crime may be definitely known, but the preparation and service of charges in such case, which will charge the particular crime he has committed, may have to await an investigation which would protract itself over a considerable period.

After pointing out that the proposed revision provided for punishment of officers responsible for delay, the comment continues, "The accused should not, it is believed, be the beneficiary of their failure."

But new Article 70 as actually enacted in 1916 merely combined old Articles 70 and 71, while making them applicable to all persons subject to military law, instead of simply to officers. Only the proviso to old Article 93 was eliminated. Here is AW 70 of 1916 (Act of August 29, 1916, c. 418, 39 Stat. 619, 650, 661):

> ART. 70. INVESTIGATION OF AND ACTION UPON CHARGES.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest: *Provided*, That in time of peace no person shall, against his objection, be brought to trial before a general

court-martial within a period of five days subsequent to the service of charges upon him.

The defects which General Crowder had pointed out in 1912 and 1916 and which Congress failed to remedy in the latter year became once more apparent in World War I, and by 1919 a War Department Board headed by General Kernan recommended a new Article 70 reading in part as follows (*Proceedings and Report of a Special War Department Board on Courts-Martial and their Procedure*, July 17, 1919, pp. 33–34):

> When any person subject to military law is arrested or confined for the purpose of trial the officer by whose order this is done shall see that a copy of the charges on which the arrest or confinement is based is served upon the accused party within eight days after his arrest or confinement, and it is the duty of the officer ordering such arrest or confinement to expedite, in so far as in him lies, the speedy trial of the case. It is the like duty of all other officers having to do with the trial of the case to expedite it in every practicable way. If the trial can not, for good and sufficient reasons, be begun within a period of 30 days from the date of arrest or confinement the immediate commanding officer, unless otherwise ordered by superior authority, shall release the accused from arrest or confinement.

In commenting on the proposed change the report stated (p. 34):

> The present article 70 calls upon local commanders to do the impossible. The changes proposed are intended to make the law conform to good practice which has never been possible under old article 70.

Article 70 as enacted in 1920, *infra*, pp. 102–103, went farther; it eliminated all provisions for release of a prisoner held in custody beyond a fixed period, and substituted a criminal sanction against "any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion." It is therefore perfectly clear that under existing law the naked fact that an accused is held in military custody without trial for a period of more than eight days after his arrest does not in any sense render his custody illegal.

In this case, an examination of the circumstances under which Radovich was held establishes that he was not illegally in custody on September 5, 1944. He was confined on August 9, and the investigation of the charges against him was not completed until August 25. While AW 70 does, of course, contemplate that, ordinarily, an investigation will be completed in eight days, it is plain that the addition of the words "if practicable" establishes that the time limitation was not intended to be absolute. Nor is there any justifica-

tion for the suggestion in the opinion below that the words "if practicable" were inserted only to provide "for unusual situations arising out of the peculiar exigencies of military life" (R. 1474). The legislative history quoted above shows that the revision of AW 70 was definitely designed to cover a situation such as this where an investigation of a serious offense might take more than eight days. As is shown by a comparative print on H. R. 12775, 66th Cong., 2d sess., the bill which became the present Articles of War, the provisions for investigation of charges were inserted in AW 70 to make certain that charges were fully examined before being forwarded for trial. That document states (p. 3):

> It has been deemed advisable also that the more essential existing regulations, prescribing the procedure to be followed to secure a thorough investigation of charges before reference for trial, with a view to diminishing the number of trials by the superior general court * * * be given statutory sanction.

The offense here under investigation was not an ordinary military offense. It involved civilians who, as the record shows, were attempting to conceal facts from the military investigators when they were interviewed on August 15, 1944, six days after Radovich was arrested (R. 507–513)—i. e., while the charges against him were being

investigated.[1] The evidence also shows that the Army authorities might well have believed that other officers may have been involved in the transactions. Under such circumstances, the period of a little more than two weeks that was actually used for an investigation of charges was, we submit, reasonable and proper under AW 70. It is important to recall in this connection that the evidence shows that Radovich was informed of the charges against him during that period.

Nor does the time from August 25 to September 5 seem to us an unreasonable period to hold in custody an officer who, after investigation, has been found to be implicated in the type of offense here charged. Manifestly, some time would be required in a case of this character to examine the results of the investigation. Moreover, in the meantime, Radovich had submitted his resignation for the good of the service, and it would be reasonable to withhold decision as to trial until that request had been acted upon. We are advised that such is the normal practice.

It is not necessary to consider whether it was reasonable to hold Radovich in confinement from September 5 until September 16, nor whether it was proper to delay his trial by court-martial

[1] Examination of Radovich's record of trial by court-martial (CM 283142) shows that the charges against him were investigated pursuant to AW 70 by Lieut. Col. George Snyder. Cf. R. 506, 517.

until May 1945. Any subsequent illegality in his confinement or any unreasonable delay in his trial would not affect the validity of his September 5 statement if on September 5 he was legally in custody. *United States* v. *Mitchell*, 322 U. S. 65. The significant facts here are that, as of September 5, 1944, Radovich was legally in custody; he had been informed of the charges against him and had had an opportunity to consult with counsel; and his statement to the F. B. I. was freely and voluntarily given. Since the mere fact that he was in custody when he made the confession would not in itself render the confession inadmissible (*United States* v. *Mitchell*, and *McNabb* v. *United States*, *supra*), the court below was in error in holding that the September 5 confession would have been inadmissible in evidence if it had been offered.

B. *Any possible illegality in the September 1944 statement did not vitiate the statement of March 1945 voluntarily made by Radovich at a time when he was free of all substantial restraint.*—Even if for some reason not now apparent the September confession should be considered inadmissible, we submit that the court below was clearly wrong in holding that such inadmissibility tainted the second confession made six months later when Radovich was free of all substantial restraint. During that six month period Radovich had full opportunity to consult

such counsel as he chose. Had he desired to limit or repudiate his earlier confession in any respect, he had ample opportunity to do so. Instead, he freely and voluntarily reaffirmed and amplified his earlier statement. To hold a confession thus freely given unavailable as evidence merely because, at his own request, Radovich reread his previous statement, seems to us a disservice to the cause of criminal justice.

The decision below, we submit, misconstrues the decisions of this Court in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, and *Nardone* v. *United States,* 308 U. S. 338, which held that the fruits of evidence improperly obtained are themselves inadmissible. There, after having obtained evidence as a result of an illegal search, the Government, from such evidence alone and without any action by the defendants, obtained other evidence which it sought to use at the trial. The defendants never consented either to the original search or to the subsequent use of the information obtained from that search to secure other evidence. Surely, in those cases, if after the first illegal search the defendants had voluntarily delivered to the Government the evidence illegally seized or had made a voluntary confession setting forth the information illegally obtained, such evidence would not have been inadmissible merely because the Government happened to have prior knowledge thereof as a result of the illegal

search. The important circumstance in those cases was the fact that there was no intervening independent exercise of free will on the part of the defendants; the secondary evidence obtained was the direct result of the Government's own illegal action.

Here, the second confession by Radovich could not come into existence by virtue of action by the Government alone; there had to be affirmative action by Radovich. He did the talking; he made the statement. The evidence establishes that his decision to take such action was freely and voluntarily made, without coercion, and at a time when he was free of restraint and had had ample opportunity to consult with counsel. It is therefore immaterial whether he did or did not reread his previous statement. The significant fact is that, at a time when he was free to repudiate or reaffirm his earlier statement, he himself, in the exercise of his free will, voluntarily confessed his guilt. The second confession was not evidence obtained as the result of the first independently of any intervening action by Radovich; his voluntary decision to reaffirm his previous statement, which he himself asked to see, was the operational fact which brought the second confession into existence.

In *Lyons* v. *Oklahoma*, 322 U. S. 596, this Court held that, even after a confession had been obtained by duress, a later voluntary confession could properly be received in evidence, and that the

mental freedom of the accused at the time of the later confession was the significant factor to be considered in determining the admissibility of such later confession. This Court there said (p. 603):

> The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances.

Although this Court exercises greater control over the admissibility of evidence in federal prosecutions than it does over state court decisions, the same rule must necessarily obtain as to federal prosecutions, viz., that one illegal confession cannot thereafter bar all subsequent confessions, no matter how freely and voluntarily made. Here, the first confession, if inadmissible at all, could have been rendered so only by virtue of the illegality of custody; no coercive influences rendering the first confession involuntarily were shown. Whatever illegality was originally present had been removed by the time the second confession was made, and the second confession was wholly voluntary. Under such circumstances, we submit, there is no basis for excluding the second confession.

The fact that Radovich at his own request reread his earlier statement at the time he made his second statement seems to us to present no grounds for holding that the second statement was in-

admissible in evidence. Even though the first confession was reread, the second confession was not the result of the first; it was the result of an exercise of free will on the part of Radovich to reaffirm his earlier statement. As such, it was proper evidence.

The logical effect of the decision below would be that whenever a confession has been obtained under circumstances which would render it inadmissible under the *McNabb* rule, no future confession, however freely given, could be admitted into evidence. The decision below does not purport to go that far, but its reasoning, consistently followed, would require such a result. Any person who has once made a confession must be aware of that fact, and his later statement will almost always to some extent be influenced by what he has previously said. The circumstance that an accused rereads his earlier statement instead of relying on his memory does not seem to us a sound basis for distinguishing between the admissibility and inadmissibility of the later confession. The true test is whether the second confession is a voluntary one made under circumstances free of coercive influence or illegal restraint. Since the second confession here clearly met that test, it was properly admitted in evidence.

II

THE PLEA OF DOUBLE JEOPARDY IS NOT AVAILABLE TO RADOVICH

As we have pointed out, *supra*, pp. 13–15, Radovich was tried by court-martial on charges of conduct unbecoming an officer and a gentleman in violation of the 95th Article of War and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service in violation of the 96th Article. The specifications under each charge alleged that he received money from the Bayers to effect the transfers of Melvin and Martin to various units in the Army. Radovich's conviction by court-martial was disapproved by the Board of Review and The Judge Advocate General, acting under AW 50½, on the ground that the court-martial had committed prejudicial error in failing to give him an opportunity to offer evidence in support of his plea to the jurisdiction. The opinion of the Board of Review is set out, for the convenience of the Court, in Appendix C, *infra*, pp. 110–121. No rehearing under AW 50½ was ordered, and the disapproval was published in War Department General Court-Martial Orders No. 240, July 26, 1946; Appendix D, *infra*, pp. 122–125.

Neither the fact nor the circumstances of the disapproval were before the district court when

it ruled on Radovich's plea of double jeopardy. The district court overruled the plea on the sole ground that the military charges did not allege the same offense as the conspiracy to defraud set out in the indictment (R. 83–85). The circuit court of appeals held that such ruling was error, but left the question of the effect of the disapproval to be determined on a new trial (R. 1475–1476).

Our position here is that the question of double jeopardy has been rendered moot by reason of the disapproval of the military conviction for reasons not going to the merits, but that, if the question is still in the case, the district court properly ruled that there was no identity between the military and the civil defenses.

A. *The disapproval of Radovich's conviction by court-martial on grounds not going to the merits eliminates the question of double jeopardy from the case.*—Since it is always the duty of one of the litigants to call the attention of the Court to facts which render a question before it moot,[8] we have set forth the facts as to the reversal of Radovich's conviction, for, in our opinion, those facts eliminate the question of double jeopardy as an issue in the case. Radovich's court-martial conviction was disapproved

[8] See Robertson and Kirkham, *Jurisdiction of the Supreme Court* (1936), pp. 440 *et seq.*, and cases there cited.

on the ground that the court-martial erred in failing to give him an opportunity to offer evidence in support of his plea to its jurisdiction, namely, that the officer who appointed the court was in fact the accuser. See pp. 112–119, *infra*. If Radovich had been able to establish this contention, the court-martial would have been without jurisdiction, AW 8 (10 U. S. C. 1479); MCM, pars. 5a, 60, and he would never have been in jeopardy. Dig. Op. JAG (1912–1940), pars. 397 (1) (1) and 397 (1) (4), pp. 241, 242; 4 Bull. JAG 3, par. 371 (1).

Since the record of trial was legally insufficient, it was not submitted to the Secretary of War for the action of the President, even though it was a case for presidential confirmation under AW 48 (10 U. S. C. 1519); instead, following the established practice under AW 50½ (see MCM, pp. 216–217), it was returned to the reviewing authority for rehearing or such other action as might be proper. No rehearing was ordered.* At military law, a direction for rehearing (i. e., a new trial, see AW 50½) must be made at the same time as the action disapproving the sentence; it cannot be made later.

* We are advised by the Office of the Judge Advocate General that this was a consequence of the fact that, by the time the record was returned, the officer who had been president of the court-martial which tried Radovich had succeeded to the command of the First Air Force and thus had become the reviewing authority.

MCM, par. 89; TM 27–255, *Military Justice Procedure,* p. 128; 2 Bull. JAG 97, par. 408 (5); see Dig. Op. JAG (1912–1940), par. 396 (3). Consequently, Radovich can not now be retried on the original charges; and, even if he were still in the service,[10] new charges would be barred by limitations. AW 39 (10 U. S. C. 1510).

The circumstance that here Radovich was not ordered retried by the same authority that reviewed the original conviction, so that the disapproval was probably a final one within the meaning of the 40th Article of War (10 U. S. C. 1511, *infra,* pp. 96–97),[11] does not mean that the disapproved conviction by court-martial will support a plea of double jeopardy. The contrary is indicated by a very precise analogy from the civilian criminal law. Where an indictment is dismissed on appeal, a new indictment may be returned against the defendant (*United States* v. *Ball,* 163 U. S. 662, 672), which, manifestly, need not follow the terms of the old indictment. If a jury should be discharged for some reason, or the judgment reversed on some ground not invalidating the indictment, there is nothing to pre-

[10] We are advised that he was recently separated from the service.

[11] It may well be, of course, that since there was a confirming authority, and since under the practice already adverted to (MCM, pp. 216–217) the confirming authority never acted, there was no final judgment within the first paragraph of AW 40. But we prefer to rest our argument on the grounds stated in the text.

vent a prosecutor, if he deems such course desirable, from procuring a new indictment charging the same offense in a different manner, and then proceeding on the new rather than the old indictment. See *Burton* v. *United States*, 202 U. S. 344, 380, where this Court said:

> * * * As the effect of the reversal of the judgment in the former case was to set aside the judgment of conviction on the first and second counts of the original indictment, the way was opened for another trial on those counts. But the Government elected not to proceed under that indictment, but to have a new one embodying the same charge as to the $500 that was made in the former case. Its right to adopt that course cannot be questioned. * * *

The civil prosecutor's option is at military law exercised by the reviewing authority after a conviction has been set aside under AW 50½. The significant fact in each instance is that the first trial is not a valid trial for the purpose of a plea of double jeopardy.

Essentially, the court-martial conviction is in the same posture as that of a verdict in a civil trial which has been reversed on appeal; there it is well established that, under such circumstances, the verdict will not sustain a plea of double jeopardy. *Murphy* v. *Massachusetts*, 177 U. S. 155, 159; *Brantley* v. *Georgia*, 217 U. S. 284;

Stroud v. *United States*, 251 U. S. 15, 18. The circumstance that under AW 50½ the appeal in court-martial convictions is automatic and does not, as in a civil trial, require affirmative action by the accused, does not in our view affect this conclusion. The grounds for reversal by the Board of Review and The Judge Advocate General were the grounds urged by the accused, and the result achieved was the result which he sought to attain at the trial. Hence we submit that the principle of the cases cited, that an accused may not base a claim of double jeopardy on a judgment which he himself has caused to be set aside, is controlling here.

Even if it be held that, by virtue of the automatic nature of an appeal in court-martial proceedings, the theory of waiver cannot be applied in this case, the trial by court-martial nevertheless will not sustain the plea of double jeopardy. In disapproving the conviction for failure to allow the accused to offer evidence in support of his plea to the jurisdiction of the court-martial, the Board of Review in effect held that all subsequent proceedings by the court-martial were invalid. The decisions of this Court on the issue of double jeopardy establish that, to serve as a basis for such a plea, the prior proceeding relied upon must have been a valid one. Where a jury is discharged because of misconduct of the juror, even without the consent of the accused, the proceed-

ings up to the point of discharge will not sustain a plea of double jeopardy. *Thompson* v. *United States,* 155 U. S. 271; *Simmons* v. *United States,* 142 U. S. 148, 153. Similarly, a trial on a fatally defective indictment or a trial before a court having no jurisdiction will not sustain the plea. *United States* v. *Ball,* 163 U. S. 662, 669; *Shoener* v. *Pennsylvania,* 207 U. S. 188, 195–196. As the Circuit Court of Appeals for the Tenth Circuit said in *McCleary* v. *Hudspeth,* 124 F. 2d 445, 447, certiorari denied, 316 U. S. 670, holding that a discharge on habeas corpus did not bar a subsequent retrial—

> * * * A proceeding, to constitute a proper basis for a claim of former jeopardy, must be valid. If the proceedings are lacking in any fundamental prerequisite which renders the judgment void, they will not constitute a proper basis for a claim of former jeopardy.

See also *Levine* v. *Hudspeth,* 127 F. 2d 982, 984 (C. C. A. 10), certiorari denied, 317 U. S. 628; *Sanford* v. *Robbins,* 115 F. 2d 435, 438–439 (C. C. A. 5), certiorari denied, 312 U. S. 628.

The same considerations are applicable here. The Board of Review and The Judge Advocate General have ruled that Radovich's trial by court-martial was not a valid trial. If a rehearing had been ordered, the defense of double jeopardy would not have been available on such retrial. Since, therefore, Radovich could have been re-

tried for the offense consistently with the 40th Article of War, it does not matter for constitutional purposes whether the new trial is by a civil or a military court. In the end he will have had only one real trial for the offense.

The opinion of the court below recognizes that, if the record had shown that the conviction by court-martial had been disapproved for reasons not going to the merits, the plea of double jeopardy would not have been available. See R. 1475–1476. Since the facts as to the disapproval are matters of official record, we submit that, on review of the other aspects of this case, this Court is properly entitled to consider the actual situation, and may, if it finds the trial otherwise free from error, reinstate the judgment as to Radovich.

B. *Even if the question of double jeopardy remains in the case, the plea is not available to Radovich because the civil indictment and the military charges do not cover the same offense.*— If the question of double jeopardy remains in the case, then, we submit, the court below was in error in holding that Radovich's trial by court-martial could sustain a plea of double jeopardy to the present indictment.

Radovich was tried by court-martial for conduct unbecoming an officer and a gentleman, in violation of AW 95, and for conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military

service, in violation of AW 96. As to each charge, Specification 1 alleged that, in August 1943, Radovich received from Samuel Bayer $2,000 to effect the transfer of Martin Bayer and Melvin Usdan from the First Fighter Command to the Medical Detachment, Station Hospital, Mitchel Field, and Specification 2 that on or about December 1, 1943, he accepted and received from Elias Bayer $5,000 for effecting the transfer of the boys from an organization alerted for duty overseas to the Air Transport Command (R. 14–17).[12] The indictment in this case alleged that Radovich and the Bayers entered into a conspiracy to defraud the United States of its right to the unbiased services of Radovich as an officer of the United States Army, and that as part of the conspiracy the Bayers would give Radovich money with intent to influence his action as an officer and induce him to arrange the transfers of Melvin and Martin. The indictment alleged a number of overt acts in support of the conspiracy, none of which consisted of the actual payment of money to Radovich (R. 8–11).

We think it is clear that the military charges and specifications and the present indictment set forth different offenses. In determining questions of double jeopardy, it is not the identity

[12] The conviction of an officer for the same acts under both AW 95 and AW 96 was held proper in *McRae* v. *Henkes*, 273 Fed. 108 (C. C. A. 8), certiorari denied, 258 U. S. 624.

of the evidence actually adduced to support the charge which is significant; rather, it is the *elements* of the offense and the evidence *required* to establish those elements which furnish the criterion for resolving the question of identity. *Pinkerton* v. *United States*, No. 719, Oct. T. 1945, decided June 10, 1946; *Blockburger* v. *United States*, 284 U. S. 299, 304; see also *Ebeling* v. *Morgan*, 237 U. S. 625, 631; *Burton* v. *United States*, 202 U. S. 344, 377–378; *United States* v. *Wexler*, 79 F. 2d 526 (C. C. A. 2), certiorari denied, 297 U. S. 703. The same rule applies at military law. *Carter* v. *McClaughry*, 183 U. S. 365, 394–395.

Here, the elements of the offense charged in the court-martial specifications were different from the elements of the offense charged in the indictment. The indictment alleged conspiracy to defraud the United States by giving and receiving money to influence official action. The military specifications charged the completed act of receiving a bribe by Radovich alone. In *Burton* v. *United States*, 202 U. S. 344, 377, this Court held that the same individual could properly be punished for the separate acts of agreeing to receive and receiving a bribe. And in *Pinkerton* v. *United States*, *supra*, this Court recently reaffirmed a long line of previous decisions holding that "the commission of the substantive offense and a conspiracy to

commit it are separate and distinct offenses." (Slip opinion, p. 3.) Those decisions are controlling here.

Radovich seeks to avoid the effect of the *Pinkerton* decision by arguing that the present case comes within the exception recognized by that decision, to the effect that there cannot be a conviction for conspiracy and for the substantive offense "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." (Slip opinion, p. 2.) But this case does not fall within that rule. In the first place, as we have shown, the overt acts charged in the conspiracy were not the acts of payment which would be necessary to establish the substantive offenses charged in the specifications. More significantly, an agreement need not necessarily have been proved to sustain the court-martial charges. The sole question before the court-martial was whether Radovich had received money from the Bayers to bring about the transfers of Martin and Melvin. Whether he did so pursuant to agreement with the Bayers, or whether he extorted the money from the Bayers by threats as they claimed, he would nevertheless have been guilty of the offense charged in the military specifications. The conspiracy alleged in the indictment, however, could not be established without proof of a meeting of minds between Radovich and the Bayers, and the trial judge specifically

charged the jury that the offense was not established if the jury found that Radovich had obtained the money from the Bayers by extortion. See *infra*, pp. 85–86. Hence the offenses before the court-martial were, both in fact and in law, different from the conspiracy charged in the indictment.

A directly analogous situation was involved in the case of *Fall* v. *United States*, 49 F. 2d 506, 510–511 (App. D. C.), certiorari denied, 283 U. S. 867, in which Fall's conviction for bribery was sustained. Fall and Doheny had previously been acquitted of conspiracy to defraud the United States at a trial in which the facts alleged in the indictment and the evidence offered in support thereof were substantially the same as those alleged in the bribery indictment returned against Fall alone. Indeed, one of the overt acts alleged in the conspiracy indictment was the payment by Doheny to Fall of the $100,000 involved in the bribery charge. The court held that the acquittal on the conspiracy indictment did not preclude Fall's trial for bribery, since in the conspiracy case the jury might have reached the conclusion that Doheny had given the money to Fall in good faith as a loan without intent to defraud, whereas, in the bribery case, the jury was concerned with Fall's state of mind alone. So here, in reverse, the court-martial was concerned only with Radovich's state of mind when he accepted the money; it was not required to find any agree-

ment by the Bayers to defraud the United States in paying over the money. At the civil trial, however, agreement among the Bayers and Radovich was the essence of the offense, and the jury had to find that the Bayers had voluntarily agreed to make payments to Radovich.

One further factor differentiates the court-martial specifications from the conspiracy charge. In substance, the military specifications charged the receiving of a bribe; the indictment charged conspiracy to defraud the United States. In *Glasser* v. *United States*, 315 U. S. 60, 66–67, this Court made it clear that a charge of conspiracy to deprive the United States of its governmental functions by accepting payments to influence official action is a different offense from conspiracy to take or give a bribe. The Court there quoted with approval the following statement from *United States* v. *Manton*, 107 F. 2d 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664:

> The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to * * * defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense.

If conspiracy to defraud the United States by means of accepting a bribe is a different offense from conspiracy to give or pay a bribe, then certainly the substantive offense of bribery is different from the offense of conspiracy to defraud the United States by agreeing with an officer to pay him money to influence his official action.

Radovich argued in opposition to the petition for certiorari that because of the practice of courts-martial of making findings by exceptions and substitutions, i. e., of finding the accused guilty of a lesser offense included in the one with which he is charged (MCM, par. 78c; 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *578–583; Davis, *Military Law of the United States* (3d ed. 1913) 142–145; TM 27–255, *Military Justice Procedure*, pp. 105–106, 244–247), any failure of proof at the military trial would have meant that "the particular military specification would have been amended by the court-martial to conform to the proof and a conviction under the charges as they stood would have followed." Br. Opp. 15; and see *id.*, 14–17. The difficulty with this argument is that a court-martial's power to make findings by exceptions and substitutions is strictly limited to instances where the offense charged includes every element of the offense found; a court-martial cannot legally find the accused guilty

of a lesser offense where that offense involves elements not included within the offense charged. *Manual for Courts-Martial* (1921)[13], pars. 299–300;[14] 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *581–583; Davis, *Military Law of the United States* (3d. ed. 1913), pp. 143–144.[14]

As we have shown, the court-martial was not required to find an agreement in order to convict; the jury was. The court-martial was concerned only with Radovich's state of mind, the jury with the Bayers' as well. Consequently, the offense alleged in the indictment could not by exceptions and substitutions have been carved out of the offenses alleged in the military specifications.

It follows that, since the elements of the offenses on which Radovich was tried by court-martial were not the same as the elements of the offense charged in the present indictment, the trial court properly overruled the plea of double jeopardy, and the decision of the court below as to this aspect of the case was error.

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[13] The provisions of the 1921 Manual are still applicable where not specifically changed. See MCM, p. vii.

[14] Numerous rulings of The Judge Advocate General which discuss whether particular offenses are included or not included within the principal offense are collected in Appendix 8 to TM 27–255, *Military Justice Procedure*, pp. 244–247; and in Appendix 1 to Wiener, *Military Justice for the Field Soldier* (Rev. ed. 1944), pp. 126–135.

III

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO PERMIT THE BAYERS TO INTRODUCE ADDITIONAL EVIDENCE FOUR HOURS AFTER THE JURY HAD RETIRED

As has been shown in the Statement, *supra*, pp. 15–17, the Bayers sought to defend themselves against the charge of conspiracy on the ground that the payments to Radovich were not made pursuant to an agreement but were extorted. In their defense they called Samuel Bayer's secretary, Miss Solomon, who testified that on November 24, 1943, Radovich called from Washington and asked Samuel Bayer to meet him for lunch that day; and that at lunch Radovich, in her presence, said that he was taking the boys with him to Burma unless Bayer paid him $5,000; and that Radovich repeated such threats on the next day, November 25. A clerk in the office of Headquarters Army Air Forces had previously testified for the Government that on November 24, 1943, Radovich had called her from Goldsboro, North Carolina, and asked her to transfer the boys from the Air Commando Group to the Air Transport Command; and it had also been shown that this transfer had been authorized by a letter from Headquarters Army Air Forces dated November 25, 1943.

In his summing up, the United States Attorney laid great stress on the November 24 date, point-

ing out that the Government's evidence as to Radovich's request for the transfer on November 24 undermined Miss Solomon's testimony relating to the claim of extortion, because it showed that, at the time Radovich was allegedly making threats, he had already put it beyond his power to carry out those threats. For convenience, we repeat here the pertinent paragraphs of his argument to the jury (R. 1072–1073):

> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command.
>
> Now we see clearly here from the undisputed evidence that this alleged extortioner is in fact bringing about the transfers of the boys out of the Transport Command [sic] on the very day that, according to Sam Bayer, he, Radovich, is threatening to take the boys on a dangerous mission that

he arranged—he, Radovich, arranged—through Miss Goertz for the transfer of these boys out of the Air Commando unit the day before the boys even arrived at Goldsboro. Because Melvin Usdan's testimony is that they did not get to Goldsboro until the 25th. So that by the time they arrived there Radovich, in carrying out the conspiracy, with the aid of the lady in Washington, had already arranged to get them out of the Commando. So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944, when Colonel Snyder asked him to tell him what he knew about the Radovich case and he said he knew very little. Well, there is certainly no doubt that $5,000 was paid by Samuel Bayer and there is no doubt that Radovich got $5,000. Radovich says the Bayers offered him the money. The Bayers say the money was paid under threat. Well, I leave it to you ladies and gentlemen to decide on the basis of the undisputed testimony in this case and the records in this case where the truth lies.

The next day, before the judge charged the jury, counsel for the Bayers stated that they had been surprised by the Government's questioning of the luncheon meeting on November 24, and that a check of the records had shown a collect call from Washington to the Bayers on that day.

At the request of counsel, the judge instructed the jury that the record showed such a call, but, at a suggestion by counsel for Radovich, stated that the record did not show who made the call.

After the jury had been out for about four hours, they requested a rereading of the United States Attorney's summing up, making particular comment on his summary of the telephone message and meetings on November 22 to 26. The court declined to read the argument of one counsel without reading the arguments of all. Thereafter, counsel for the Bayers asked leave to put in evidence records he had obtained showing a collect call from Arlington, Virginia, to the Bayers from one "Ravish" on November 24, 1943. The judge declined to reopen the case at that stage. On appeal the circuit court of appeals held that, in view of the jury's question, this action by the trial judge constituted an abuse of discretion.

The decision below in this respect involves, we submit, a wholly unwarranted substitution of the judgment of the circuit court of appeals for the discretion of the trial judge. It is based on a misconstruction of the United States Attorney's argument and of the significance of the excluded evidence in relation thereto.

The gist of the prosecution's argument was that the defense of extortion was untenable for the reason that, at the very time when, according to the Bayers, Radovich was making threats

to take the boys with him to Burma unless he received $5,000, he had already arranged matters so that it was beyond his power to carry his threats into effect. According to the defense, Radovich was making the threats on November 24 and 25, but the Government's evidence showed that the transfer out of the Commando group to the Air Transport Command had been arranged for on November 24 and was officially directed on November 25.

The United States Attorney did not directly question that there may have been a meeting in New York. He said (R. 1072–1073), "The absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August 1944, when Colonel Snyder asked him to tell him what he knew about the Radovich case and he said he knew very little." He was characterizing as false not the alleged meeting in New York but the claim of extortion.

Regardless of whether Radovich did or did not call Bayer from Washington on November 24, regardless of whether he did or did not see him in New York, the Government's argument loses none of its force. It would still be true, as the United States Attorney argued, that the transfer had been arranged and officially authorized at the time that, according to the Bayers, Radovich was making threats to extort money. Hence the fact

that the jury was interested in this part of the United States Attorney's summing up did not, as the court below thought (R. 1472), make the question of the telephone call from Washington a matter of importance. The fact of the matter is that if the defense had been allowed to put in its evidence in respect of the telephone call, after the trial judge had declined to read the United States Attorney's argument, an inconclusive fact would have been endowed with a significance that was wholly unwarranted. The mere fact that Radovich made the telephone call from Washington on November 24 would not detract from the testimony that he had requested the transfer on November 24th, and that, according to official records, the transfer was authorized by a letter from Headquarters Army Air Forces Washington on November 25th. The United States Attorney's argument would remain as potent as before.

Other evidence sought to be adduced by the Bayers, in support of a motion for a new trial on newly discovered evidence,[15] tends to support

[15] In opposition to the petition for certiorari, Elias Bayer referred to evidence set forth in his motion in the circuit court of appeals for leave to file a motion in the district court for a new trial on the ground of newly discovered evidence. This document, entitled "Petition, Affidavits, and Notice of Motion to suspend Appellate Proceedings, etc.," was not included in the record, since the determination of that motion was not an issue in the judgment as to which the Government sought review. However, a certified copy has been filed with the Clerk by Elias Bayer.

rather than to negative the force of the United States Attorney's argument, and shows even more clearly than the evidence at the trial the insignificance of the fact, if it was one, that Radovich called the Bayers from Washington on November 24.

One point made in that motion was that Miss Goertz, the clerk in Headquarters Army Air Forces, who testified at the trial that Radovich had called her from Goldsboro on November 24 to arrange the transfer from the Air Commando group to the Air Transport Command, had testified at Radovich's court-martial that the request for such transfer was made on November 22 (pp. 35–36). If her prior testimony were correct, it would even more clearly establish that the transfer had been arranged before the alleged threats were made.

There was also included a record of Radovich's flights which shows him to have come to Washington from New York on the morning of November 24 with no other flights that day (p. 48). Radovich in his affidavit stated that he might have gone back to New York in some other plane and had lunch with the Bayers in New York, although he had no independent recollection of such fact. The record further shows, however, that on November 25, Radovich left Washington at 9:30 in the morning for Connecticut and did not arrive at La Guardia Field, New York, until 4:00 p. m. that

day (p. 48). This completely demolishes the Bayers' theory that Radovich arranged for the letter from Headquarters Army Air Forces on November 25 after he had secured a promise of payment from the Bayers on November 25; he could not have secured the promise from the Bayers after arriving at La Guardia Field at four o'clock and had a letter sent from Headquarters in Washington that same day.

All that the record of the telephone call tends to prove is that Miss Goertz may have been mistaken in stating that Radovich called her from Goldsboro, and that in fact he may have called her from Washington on November 24th. The significant point is that the record of the telephone call did not in any way tend to prove extortion by Radovich, nor weaken in any way the argument that he did not make any threats because he had already put it out of his power to carry out such threats.

The evidence that the transfer had been requested by Radovich on November 24, 1943, and officially authorized on November 25, had been introduced as part of the Government's case long before Miss Solomon testified to threats by Radovich on November 24 and 25. We have already noted above, p. 17, that defense counsel took particular note of the date of the November 25th letter authorizing the transfer (R. 123). The

fact that the defense failed to appreciate that the Government's evidence tended to undermine their claim of extortion certainly does not constitute such surprise as would justify the reopening of the trial. On such a theory, any failure of counsel to draw inferences from known evidence is prejudicial surprise which can prolong a trial indefinitely; and certainly the decision below on this point goes a long way towards attaching a premium to the afterthoughts of defendants' lawyers, to the prejudice of orderly administration of the criminal law.

The crux of the matter is that the Government's evidence was put in long before the Bayers were called upon to present their defense, and that the evidence offered by the Bayers four hours after the jury had retired in no way detracted from the substance of the Government's argument. In those circumstances it is clear that the district judge properly refused to reopen the case. At that stage of the trial the matter was clearly one for the discretion of the trial judge (*Crumpton* v. *United States*, 138 U. S. 361, 364; *Safford* v. *United States*, 252 Fed. 471, 474 (C. C. A. 2); *Hart* v. *United States*, 84 Fed. 799, 804 (C. C. A. 3)), and the circuit court of appeals exceeded its appellate function in finding an abuse of discretion on these facts. Cf. *United States* v. *Johnson*, 327 U. S. 106.

IV

THE TRIAL JUDGE'S CONCEDEDLY ACCURATE CHARGE FURNISHES NO BASIS FOR REVERSAL

We repeat here, for convenience, the trial judge's charge dealing with the Bayers' defense of extortion (R. 1157–1158):

> Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for [an] immediate dangerous overseas mission, which would be a violation of his duty as an officer.
>
> The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.
>
> If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would

not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

The opinion of the court below indicates that a majority of the court, while conceding the correctness of the charge, considered it "so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen" (R. 1471), but it is not clear whether reversal of the judgments would have been rested on this ground alone (R. 1471).

We have some difficulty in understanding the basis of the objection to the judge's charge. As Judge Clark, writing the opinion, pointed out (R.

1471), "There is no question but that this charge was an accurate, albeit brief, statement of the law."[16] To us the charge seems to have stated in clear terms that, if the jury found that the payments by the Bayers were made as a result of threats by Radovich, the payments could not be the result of a criminal agreement, and hence would not establish conspiracy. Certainly it was also correct to tell the jury that, if an agreement were proved, the crime was established even though the Bayers may have been reluctant to carry out the agreement by actually paying over the money or may have paid more than they originally expected.

There is no evidence that the jury failed to understand the charge. During the course of their deliberations, they did, it is true, request a rereading of the charge on conspiracy (R. 1155). But, after the judge had repeated his instructions on the subject (R. 1156–1162), he asked whether there was any point which was not clear or which the jury would like to have amplified (R. 1162), and no such request was made.

Under the circumstances, we submit that a reversal of the Bayers' conviction on the basis of the judge's charge was wholly unwarranted. Even

[16] Our reference to "concededly accurate" is, of course, to the concession made by the court below; we do not suggest that the Bayers conceded its accuracy. Cf. Samuel Bayer, Br. Opp. 6; Elias Bayer, Br. Opp. 27.

when error is shown at a trial, such error is not in itself ground for reversal; its significance must be judged and weighed in the light of the whole case. See *Kotteakos* v. *United States,* Nos. 457–458, Oct. T. 1945, decided June 10, 1946, where the history of the harmless error statute is set out in detail. In the present case there is no finding that there was error, and there is not even a suggestion of prejudice. The evidence of the defendants' guilt was clear, strong, and convincing. The mere circumstance that a majority of the court below might have worded the charge in somewhat more elaborate phraseology does not seem to us a proper ground for the reversal of a well merited conviction. The decisions of this Court in *Bollenbach* v. *United States,* 326 U. S. 607, and *Bihn* v. *United States,* No. 675, Oct. T. 1945, decided June 10, 1946, require only that a charge be accurate, not that it be verbose.[17]

[17] The Bayers argue that the trial judge erred in failing to charge the jury that the Air Commando group was a voluntary one and in failing to mention their contention that the boys were not adequately trained for duty overseas (Samuel Bayer, Br. Opp. 6–7, 13; Elias Bayer, Br. Opp. 18–19, 25–26). However, the trial judge did not undertake to review the evidence and thus was under no obligation to cover evidential details. There was never any doubt in this case that the transfer of the boys into the Air Commando group was improper and that they were not fit material for such an organization. The question was merely whether Radovich arranged that transfer as a means of getting them out of the alerted airborne engineer unit pursuant to an agreement with the Bayers, or whether he arranged the improper transfer as a means of extorting money from the Bayers.

V

THERE IS NO MERIT IN OTHER CONTENTIONS URGED AS INDEPENDENT GROUNDS FOR AFFIRMANCE OF THE JUDGMENT BELOW

In opposition to the petition for certiorari, Elias Bayer has suggested several independent grounds for affirmance of the judgment below, none of which, we submit, present any issue of merit.

A. The propriety of admitting proof of gifts by the Bayers to Army officers other than Radovich is challenged as permitting prejudicial irrelevant matters to go before the jury. Assuming, as Elias Bayer contends, that at the trial the broader charge of the indictment was narrowed to an issue of conspiracy to defraud the United States of the honest services of Radovich alone, the testimony as to the Bayers' relationship with other officers was nevertheless clearly relevant. Proof that the Bayers made a practice of distributing largess to officers who were in a position to help the boys certainly had a bearing on the question of their intent to defraud, and became particularly relevant in view of their claim that they were the innocent victims of extortion. The admissibility of this kind of evidence bearing on the question of motive and intent is well established. *Glasser* v. *United States*, 315 U. S. 60, 81–82; *Williamson* v. *United States*, 207 U. S. 425, 451; *Debs* v. *United States*, 249 U. S. 211, 215.

In his main charge, the judge stated (R. 1137):

> * * * Whether these persons, or any of them, or any of the persons who have testified as witnesses, were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participation may bear on the weight or credibility of their evidence.

Again, in response to a question by the jury, the judge made clear the purpose of the evidence relating to other officers, stating as follows (R. 1168–1169):

> The only persons whom you are trying in this case are the three defendants, Elias Bayer, Samuel Bayer and the defendant Radovich, and the only persons as to whom your verdict can in any wise affect, and they are the only persons whose guilt or innocence you should consider. Now there are other persons who have been mentioned in the testimony, persons who have testified here about their own activity in connection with the activities of these defendants. Now as to whether those persons, or any of them, are guilty or innocent of anything, should not concern you at all, they are not here on trial, with this exception: you may consider that for what bearing their activities have upon the actions of the defendants who are upon trial and for what effect in

> your judgment the activities of these other persons might have upon the testimony which they have given, that is whether it is true or not, whether it is all true or part true. But as to whether they are guilty, whether any person other than those named in this indictment are guilty of any offense or not, is not a matter which should concern you at all. You are charged with the duty of trying the persons named in the indictment and those only.

Although the court may not have expressly stated that evidence of the dealings with other officers was limited to motive and intent, the instructions quoted above had such effect for they permitted the jury to consider such evidence only insofar as they tended to show an agreement with Radovich.

The Bayers did not object to the admission of such evidence and did not request an instruction limiting its applicability to intent. They merely sought an instruction to the effect that they were guilty of no misconduct in their dealings with other officers (R. 1100, 1104), a request which was, of course, properly refused.

B. The contention that the judge committed reversible error in his charge with respect to the aliases set forth in the indictment is not well taken in view of the fact that the whole issue was raised by the defense. The jury would never have learned of the use of the alias designation

if Bayers' counsel had not unnecessarily brought it to their attention for the first time in his summing up (R. 990). Neither the United States Attorney nor counsel for Radovich ever referred to the alias, and the indictment was neither read to the jury during the trial nor a copy given to them when they retired. After the judge had instructed the jury, counsel for the Bayers specifically asked him to instruct the jury on the meaning of an alias (R. 1147), and asked leave to add such a prayer to his requests to charge (R. 1149). The judge then charged the jury as follows (R. 1152–1153):

> Ladies and gentlemen, I have only one matter to add: It has been called to my attention that the indictment as to the two defendants Bayer, refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the wording "alias" is "other or otherwise," and carries no inference. However, in common acceptation of the word it sometimes is considered to refer to a person who has more than one name for improper purposes. There is no proof about that, and I charge you to not infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the

> indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name before they became Americanized. So I direct you to disregard the alias reference entirely.

When defense counsel objected to this instruction as being inflammatory, the judge said to the jury (R. 1153):

> In view of the exception just made by counsel, I wish to state that I certainly meant nothing inflammatory or derogatory to any one person whatsoever, and I charge you that I certainly meant none and I don't believe you received any. * * *

C. Petitioner's requested instruction concerning the duty of each individual juror to arrive at an independent conclusion with respect to guilt (R. 1091) was properly refused. The requested language is taken from the opinion of this Court in *Allen* v. *United States*, 164 U. S. 492, where this Court was considering the propriety of an instruction impressing upon the jury the duty of considering the opinion of others in an attempt to reach an agreement. The Court was justified in refusing to emphasize one aspect of the juror's duty as against the other. *Egan* v. *United States*, 5 F. 2d 267, 268 (App. D. C.); *Horton* v. *United States*, 15 App. D. C. 310, 329. Moreover, failure to give one out of numerous requests to charge, which does not relate to a vital issue in the

case, does not constitute reversible error, even though such request may be a correct abstract statement of law. *Walker* v. *Johnson,* 96 U. S. 424, 429; *Pine* v. *United States,* 135 F. 2d 353, 355 (C. C. A. 5), certiorari denied, 320 U. S. 740; *Burk* v. *United States,* 134 F. 2d 879, 883 (C. C. A. 5).

D. The requested charge that fraud is never presumed but must be proved (R. 1088) had no application to the facts of this case. The trial judge correctly told the jury that the fraud charged in the indictment was the deprivation of the Government's right to the honest and faithful services of its officer (R. [redacted]33). *Haas* v. *Henkel,* 216 U. S. 462, 479.

E. The request to disregard immaterial statements in the statements by the Bayers (R. 1100) was so intermingled with improper requests to charge on the evidence as to the purchase of uniforms and entertainment of other officers that the failure to give such charge could be justified on such ground alone. In addition, it should be noted that the court expressly afforded the defense opportunity to specify the alleged immaterial matter in the statements and that subsequently counsel withdrew the objection to the portion then under consideration (R. 684–685). Thereafter, defense counsel objected to other parts of the statements apparently on the theory that the Bayers' dealings with officers other than

Radovich were immaterial (R. 686–687). Subsequently, when the Government proposed to omit part of a statement, defense counsel stated that they did not object to having it all read (R. 692). The allegedly immaterial matter to which Bayer objects is apparently the portion of the statements referring to officers other than Radovich. Since, as we have shown, evidence of the Bayers' dealings with these officers was clearly relevant on the issue of their intent, the objection is without merit.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted.

GEORGE T. WASHINGTON,
Acting Solicitor General.

THERON L. CAUDLE,
Assistant Attorney General.

FREDERICK BERNAYS WIENER,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
Attorneys.

FEBRUARY 1947.

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APPENDIX A

STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The Articles of War here involved (10 U. S. C. 1471 *et seq.*) are as follows:

> ART. 40. AS TO NUMBER.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.
>
> No authority shall return a record of trial to any court-martial for reconsideration of—
>
> (*a*) An acquittal; or
>
> (*b*) A finding of not guilty of any specification; or
>
> (*c*) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under

that charge, which sufficiently alleges a violation of some Article of War; or

(*d*) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited. [10 U. S. C. 1511.]

ART. 50½. REVIEW; REHEARING.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate

General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge

Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part: *Provided*, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War:[1] *Provided further*, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.[2]

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing

[1] The first proviso to this paragraph was added by Section 1 of the Act of August 20, 1937, c. 716, 50 Stat. 724.

[2] The second proviso to this paragraph was added by the Act of August 1, 1942, c. 542, 56 Stat. 732.

the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided,* That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless, in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the

findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government: *Provided,* That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War:[3] *Provided further,* That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.[4]

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

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[3] See note 1, *supra*, p. 99.

[4] See note 2, *supra*, p. 99.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the Board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President. [10 U. S. C. 1522.]

ART. 70. CHARGES; ACTION UPON.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred to a general court martial[5] for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything

[5] The words "to a general court martial" were inserted by Section 2 of the Act of August 20, 1937, c. 716, 50 Stat. 724.

he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him. [10 U. S. C. 1542.]

ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. [10 U. S. C. 1567.]

ART. 96. GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court martial, according to the nature and degree of the offense, and punished at the discretion of such court. [10 U. S. C. 1568.]

APPENDIX B

MANUAL FOR COURTS-MARTIAL, 1921

76a. Investigation of Charges—If the charges and specifications (1) appear to be in proper form, and (2) properly to allege one or more offenses cognizable by a court-martial, against an accused, who is (3) a person subject to military law, and (4) belongs or pertains to his command, the commanding officer so receiving them will proceed as follows:

1. If the accused is not an officer, and it appears to the commanding officer that the charges are trivial or inconsequential, he may disregard them; otherwise,

2. He will consider whether the case presented is one which he can properly dispose of under the one hundred and fourth article of war; and, if so, he will so dispose of it. (See par. 336a, infra.) Otherwise, he will investigate it, as follows:

3. He will cause the person preferring the charges, together with all available witnesses mentioned in the memorandum in the charges, and also the accused, and any available witnesses desired by the accused, and any other available witnesses of whom he may learn, to appear before him at a stated time (to be fixed either by standing orders or otherwise), at his office or headquarters, or other available place, within the next twenty-four hours (except in the case of an intervening Sunday or holiday, and then within the next succeeding 24 hours thereafter), with all available docu-

mentary evidence, including the service record of the accused, and will there informally investigate the charges, substantially in the same manner as upon a hearing before a summary court. The witnesses (except the accused) will be sworn, but no record will be made of the testimony, and no counsel will ordinarily appear either for the accused or for the prosecution (although in exceptional cases an available defense counsel of a general or special court-martial, or other counsel, may be permitted by the commanding officer, in his discretion, to appear for the accused, and a trial judge advocate of a general or special court-martial, or other officer, for the prosecution). At such investigation full opportunity will be given to the accused to cross-examine the witnesses whose statements are unfavorable to him, and to present anything he may desire in his own behalf, either in defense or mitigation; and all available witnesses requested by the accused will be called and examined. The commanding officer will, before receiving any statement by the accused, carefully warn him that it is not necessary for him to make any statement with reference to the charges against him, but that, if he does make one, it may be used against him. (See par. 225b, infra.)

NOTE.—If exigent circumstances make it impracticable for the commanding officer to conduct any particular investigation himself, he may order it to be made by the second in command, or by such other officer as he may designate on account of rank, experience, and attainments.

* * * * *

7. If either

(a) The accused is an officer, and, upon such informal investigation, the commanding officer is of opinion (1) that the charges are not such as can be disposed of under the one hundred and fourth article of war and (2) that trial by a general court-martial will probably be necessary; or

(b) The accused is any person subject to military law other than an officer, and upon such informal investigation the commanding officer is of opinion that (1) an offense has been committed, and that (2) there is substantial evidence tending to show that the accused is probably guilty, and that (3) the charges are not such as can be disposed of under the one hundred and fourth article of war, or (4) by trial before a summary court-martial within his command, and that (5) trial by special or general court-martial will probably be necessary; he will either himself proceed with the investigation either then or at such other convenient time and place as he may determine, or else he will refer the charges for further investigation to the summary court officer of the command, or to some other officer (other than the officer, if any, preferring the charges) whose rank, experience, and qualifications are such as to fit him for the performance of this important judicial duty.

NOTE.—If such commanding officer is himself the officer exercising general court-martial jurisdiction over the command, he will proceed in case the accused is an officer, in the same way as if the accused were not an officer. No authority inferior to the officer exercising general court-martial jurisdiction over the command will dismiss

properly drawn charges against an officer, except upon disposing of them by punishment under the 104th Article of War.

8. The officer so proceeding with the investigation (whether the commanding officer himself or another officer) will examine all available witnesses and documentary evidence in the same manner hereinbefore directed in clause No. 3 of this paragraph, except that he will, upon such examination, reduce the material testimony given by each witness, on direct examination and on cross-examination, to a clear, succinct statement or summary (for form, see Appendix 18), which, in the presence of the accused, will be read over to the witness and signed and sworn to by him. When it is not practicable to obtain personal testimony from any distant witness, whose testimony is deemed material, either for the prosecution or for the defense, a signed written statement from such witness will be obtained by the investigating officer, if practicable, of the testimony which the witness would give if present, and will be shown to the accused, and included with the summaries of the testimony of the witnesses examined in person, among the documents returned with the report of the investigation. Any available papers or documents which may serve to throw light on the case will be likewise shown to the accused, and returned with the report of the investigation. Any statement made by the accused will likewise be reduced to writing, and will be read over to him, and he will be offered an opportunity to sign it, if he so desires, but he will not be required to do so, and will be advised that it is not necessary for him to do so. Care

will be taken to insure that the accused is fully advised of the nature of the offense, or offenses, charged against him, and of all his legal rights in the premises.

An officer charged with the important duty of investigating charges for trial by court-martial will maintain throughout the investigation an attitude of judicial fairness, the object of his investigation being to prevent unjust or unnecessary trials quite as much as to establish the existence of facts upon which the accused may properly be brought to trial.

APPENDIX C

BOARD OF REVIEW OPINION

WAR DEPARTMENT

ARMY SERVICE FORCES

In the Office of The Judge Advocate General

WASHINGTON, D. C.

SPJGK—CM 283142 17 AUG. 1945.

UNITED STATES *v.* MAJOR WALTER V. RADOVICH, (O–416891), AIR CORPS.	FIRST AIR FORCE Trial by G. C. M., convened at Mitchel Field, New York, 11, 27, 28 and 29 June 1945. Dismissal, total forfeitures and confinement for two (2) years.

OPINION OF THE BOARD OF REVIEW

LYON, LUCKIE, MOYSE and SYKES, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

Charge I: Violation of the 95th Article of War.

Specification 1: In that Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

Specification 2: In that Major Walter V. Radovich * * *, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

Charge II: Violation of the 96th Article of War.

Specification 1: In that Major Walter V. Radovich * * *, Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth

Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

Specification 2: In that Major Walter V. Radovich * * *, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

The accused pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence but remitted one year of the confinement and forwarded the record of trial for action under Article of War 48.

3. Charges were preferred against accused on 10 August 1944. The report of investigation is dated 24 August 1944. Charges were served on accused 30 May 1945. Accused was tried in June 1945. After arraignment and before pleading to the general issue, accused entered a special plea to the jurisdiction of the court on the ground

"that the Convening Authority in this case was the accuser and the prosecutor of this case" (although his name was not signed to the Charge Sheet) and stated that "we stand ready to prove that plea." The prosecution argued that "this case has been referred to this court for trial and that the court has no other choice than to proceed with the trial." The law member then ruled on the plea as follows:

"Subject to objection by any member of the court, the plea to the jurisdiction is denied." There was no objection to any member of the court (R. 20).

The foregoing transpired after the accused had entered another special "plea in bar" that the investigating officer had not made the investigation required by Article of War 70 and that the case was referred to trial without previously having been thoroughly and impartially investigated, which plea was denied without the opportunity afforded accused to introduce evidence in support thereof, although "an offer of proof" was specifically made (R. 17–19).

After the prosecution had rested its case on the general issue, counsel for defense stated that certain "witnesses" whose attendance had been requested by a letter before trial to the trial judge advocate including "Colonel Stewart" who preferred the charges, and "General Hunter," the convening authority, would not be needed for the defense because of the denial of the special pleas of accused (R. 218). Prosecution stated that all of the witnesses requested were available (R. 219). Before defense introduced any witnesses whatever,

the law member stated that "the court would permit evidence in support of those proffers of proof at the time the defense puts in its case." Defense Counsel stated that he had not "contemplated" the introduction of proof because he assumed that the overruling of his special pleas had been final. The case was then adjourned until the following day. No evidence was adduced relating to the special pleas. (R. 223–225.)

Considering only the plea that the convening authority was actually the accuser, a plea in bar to the jurisdiction of the court (see AW 8), the question presented is whether or not the ruling of the law member in overruling the plea without permitting accused the right to adduce proffered evidence in substantiation of the plea vitiates the record of trial.

The Manual provides that before "passing on a contested special plea the court will give each side an opportunity to introduce evidence and make an argument. A decision on a special plea is a decision on an interlocutory question" (MCM, 1928, par. 64*a*). TM 27–255, Military Justice Procedure, paragraph 86–B, provides that where "the accused has made a special plea to a particular specification or charge, that plea must be disposed of before the accused is required to plead to the merits of the case." This rule of criminal procedure is well established and recognized in practically all state and Federal jurisdictions.

The Supreme Court, in the case of *Thompson* v. *United States*, 155 U. S. 271, said:

> As the matter of the plea *puis darrein continuance*, setting out the previous discharge of a jury after having been sworn,

> and the plea of not guilty were not inconsistent with each other, it accorded with the rules of criminal pleading that they might stand together, *though, of course, it was necessary that the issue under the first plea should be disposed of before the cause was disposed of under the plea of not guilty. "Commonwealth* v. *Merrill,"* 8 Allen, 545; 1 Bishop on Criminal Procedure, sec. 752)." (Italics supplied.) (See also *Ford* v. *United States*, 273 U. S. 593.)

In another case it was stated (dictum) by the same court:

> So if, upon the hearing of the written motion to quash the panel of the petit jurors, facts stated in that motion had been proved, or if the opportunity to establish them by evidence had been denied to the accused, the judgment would be reversed (*Martin* v. *Texas*, 200 U. S. 316).

This dictum was approved in *Edwards* v. *United States*, *infra*. In *United States* v. *Hopkins*, 228 Fed. 173, the court said:

> It may first be noted that the plea of autrefois acquittal or conviction should not be tendered simultaneously with the general issue—It is the rule in criminal law, as it was at common law on the civil side, that defenses both dilatory and peremptory, if they did not go to the merits of the controversy, should be pleaded first, in order that judgment (if against defendant) might be respondeat ouster. This practice arose after the severity which directed final judgment against defendant on overruling a plea in bar (*Rex* v. *Taylor*, 3 B. & C. 502) had been modified.

The basis for the rule is stated in *Earle* v. *State* (Ind. 1924), 142 N. E. 405. In discussing the "Right at common law" to plead specially "in bar" the defense of "former acquittal or conviction" the court said:

> The right to so plead may be very important, but it may be just as important to have the issue thus presented tried separate and distinct from the question of guilt or innocence. These are rights which the accused may insist upon—For by such procedure his special plea would be tried according to legal rules, and uninfluenced by a trial at the same time of the general issue. That he may waive these rights we have no doubt (*Toney* v. *State*, 10 Ala. App. 220, 65 South. 92), but, unless he does so, it would be error to compel him to go to trial on both the general and special issues at the same time. In *Commonwealth* v. *Merrill*, 8 Allen (Mass.) 545, it is said:
>
> "But the defendant had a right to a trial of his special pleas according to legal rules, and, as he did not waive that right, a majority of the court are of opinion that he has suffered a legal injury by being deprived of such trial."

To similar effect is *Foster* v. *State* (Ala. 1864), (39 Ala. 229) where the accused had before the court pleas of autrefois acquittal and of not guilty and the issues were tried together. It was held that failure to decide the issue raised by the special plea prior to that raised by the general issue constituted error. The Prosecution's argument that, regardless of the error, it was apparent from the record as a whole that accused suffered

no injury thereby, was answered by the court as follows:

> The principle is, that injury must be presumed, unless it is clearly seen that no injury resulted. We cannot see that the defendant sustained no injury by the submission of the two issues together to the jury. On the contrary, we can conceive that the defendant may have been seriously injured by such a course of proceeding. The multiplicity of issues to be simultaneously considered may have confused the jury, and embarrassed the defendant, * * * may have caused the jury to be influenced in finding a *verdict* of guilty upon one issue, by testimony which contributed to show guilt under another. * * * In cases of this magnitude which are made felonies by statute, involving the liberty of the citizen, the court will not be astute in speculating upon the chances of injury to the accused, in order to sustain a conviction effected under such circumstances.

The same rule is recognized in Federal courts (*Kirven* v. *Chemical Co.*, 145 Fed. 291).

Tested by the foregoing authorities, it is clear that the aforesaid ruling of the law member was erroneous and injuriously affected the substantial rights of accused. Since accused was precluded from exercising his right to adduce proferred evidence to substantiate his plea in bar he was under no legal obligation to submit such proof after his plea had been arbitrarily rejected and

after the prosecution had completed its case on the general issue, although the opportunity to do so was then offered him. He was entitled to have the evidence supporting his plea considered by a court which was "uninfluenced by a trial at the same time of the general issue." Furthermore, his plea had already been denied, which fact would additionally tend to deny him the impartial decision to which he was fundamentally entitled. As to whether accused might affirmatively have waived his right to the erroneous procedure (see *Earle* v. *State, supra; Toney* v. *State,* 65 So. 92) is immaterial since the record shows that he did not do so.

Although the Board of Review may feel that he is guilty of the alleged offenses, the accused was entitled to a fair, legal and orderly trial. The error is deemed to be substantial and prejudicial, and was not cured by the action of the law member, after the prosecution had rested in then offering accused the opportunity of presenting evidence on a plea in bar previously denied. Article of War 37 is not, under the circumstances, sufficiently comprehensive to justify holding that the belated action of the law member purporting to correct his previous erroneous ruling cured the defective procedure. To hold that the mere opportunity afforded an accused to introduce evidence at a late stage of a case on a preliminary issue previously denied him without hearing testimony thereon in effect cures the error, would deny to accused any right whatever as to established and orderly procedure. As said by the Supreme Court in *Edwards* v. *United States,* 312 U. S. 473:

> But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions * * *. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden.

In this case, the Board of Review is under the solemn obligation of safeguarding the basic principles of military justice and criminal procedure to the end that an accused may not only have a fair trial but that all who read the record may know that he had a fair trial. That a fundamental mode of established procedure was violated is beyond question. The Board of Review considers the error to be a prejudicial one which vitiates the record of trial.

4. The records of the War Department show the accused will be 26 years of age on 16 November and is single. The record of trial indicates that accused is married and has one child. He entered the military service as a Flying Cadet on 12 October 1940 and was commissioned a second lieutenant of Air Corps, Reserve, on 29 May 1941 and ordered to active duty effective 30 May 1941. He was promoted to first lieutenant, Army of the United States, on 1 February 1942; to captain, AUS (AC) on 5 August 1942; to captain, AUS, on 22 February 1943; and to major, AUS (AC), on 1 March 1944. He served in the India-Burma Sector of the China-Burma-India Theater of Operations and while serving overseas he was

awarded the Air Medal and the Distinguished Flying Cross with Oak Leaf Cluster.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings and the sentence.

/s/ IRVING E. LYON, *Judge Advocate.*
/s/ CHARLES A. LUCKIE, *Judge Advocate.*
(On Leave) *Judge Advocate.*
/s/ CHARLES S. SYKES, *Judge Advocate.*

1st Ind.

SPJGK – CM 283142 AUG 23 1945.
Hq ASF, JAGO, Washington 25, D. C.
TO: Commanding General, First Air Force, Mitchel Field, New York

1. In the case of Major Walter V. Radovich (O–416891), Air Corps, I concur in the foregoing opinion of the Board of Review holding that the record of trial is legally insufficient to support the findings and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½ and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the

foregoing opinion and this indorsement. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows:
(CM 283142).

(s) MYRON C. CRAMER,
Major General,
The Judge Advocate General.

2. Incls.
1. Record of trial.
2. Form of action.

APPENDIX D

GCMO 240, WAR DEPARTMENT, 1946

GENERAL COURT-MARTIAL
ORDERS, No. 240

WAR DEPARTMENT,
Washington 25, D. C., 26 July 1946

Before a general court martial which convened at Mitchel Field, New York, pursuant to paragraph 13, Special Orders No. 148, 28 May 1945, as amended by paragraph 17, Special Orders No. 156, 5 June 1945, Headquarters, First Air Force, was arraigned and tried—

Major *Walter V. Radovich*, O416891, Air Corps.

Charge I: "Violation of the 95th Article of War."

Specification 1.—"In that Major *Walter V. Radovich* (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00 lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York."

Specification 2.—"In that Major *Walter V. Radovich* (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and

receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement."

Charge II: "Violation of the 96th Article of War."

Specification 1.—"In that Major *Walter V. Radovich* (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00 lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York."

Specification 2.—"In that Major *Walter V. Radovich* (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organiza-

tion then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement."

PLEAS

To the *Specifications* and CHARGES "Not guilty."

FINDINGS

Of the *Specifications* and the CHARGES: "Guilty."

SENTENCE

To be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for three (3) years. (No evidence of previous convictions considered.)

The sentence was adjudged 29 June 1945.

The action of the approving authority is:

HEADQUARTERS FIRST AIR FORCE,

Mitchel Field, New York, 12 July 1945.

In the foregoing case of Major *Walter V. Radovich,* O416891, Air Corps, Mitchel Field, New York, the sentence is approved, but one year of the confinement adjudged is remitted. The record of trial is forwarded for action under the 48th Article of War.

(Signed) F. O'D. Hunter,
(Typed) F. O'D. HUNTER,
Major General, U. S. Army,
Commanding.

The record of trial was examined by the Board of Review in the Office of The Judge Advocate General and was held legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General concurred in said holding. Pursuant to Article of War 50½, the findings of guilty and the sentence are disapproved.

BY ORDER OF THE SECRETARY OF WAR:

DWIGHT D. EISENHOWER,
Chief of Staff.

OFFICIAL:

EDWARD F. WITSELL,
Major General,
The Adjutant General.

U. S. GOVERNMENT PRINTING OFFICE: 1947